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18 - Brief for Appellant, Adelaide Neuwirth, nos. 36, 82, and 114

19 - Brief for the Interstate Commerce Commission, nos. 36, 82, and 114
20 - Brief for the United States, nos.36,82,114
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Irreparable damage not shown

The District Court disposed of the requirement that appellees show irreparable damage to justify the issuance of the injunction herein, as follows:

> "The rule that a plaintiff, to entitle himself to an injunction, must show irreparable damage has no bearing on plaintiffs' right to maintain this action. All that it means is that they cannot have an injunction if they have an adequate remedy at law. If plaintiffs have, as we think, this right to invoke the protection of the Investment Company Act against an unlawful assumption of jurisdiction by the I. C. C., they have no adequate remedy at law to vindicate that right" (R. 612, 613).

The Court, in support of its holding that irreparable damage was sufficiently proved herein by a showing that the remedy at law was inadequate, cites *Kerr on Injunctions*, 3rd Ed., ch. III, Sec. 1, p. 14 (R. 613). In discussing the right to an injunction, the author states at pages 14-15 of the work:

> "* * * By the term 'irreparable injury' it is not meant that there must be no physical possibility of repairing the injury; all that is meant is, that the injury would be a grievous one, or at least a material one, and not adequately reparable by damages; and by the term 'the inadequacy of the remedy by damages' is meant that the remedy by damages is not such a compensation as will in effect, though not *in specie*, place the parties in the position in which they formerly stood. * * *"

Whether or not a showing of inadequacy of a remedy at law is a sufficient substitute for irreparable damage, it is obvious that the applicants for an injunction must demonstrate some wrong for which the law does not supply

an adequate remedy. To say, as does the Court below, that plaintiffs have suffered a wrong and an injury by virtue of the regulation of Alleghany by the ICC rather than the SEC, hardly squares with the confidence shown by Congress in the ICC when, in adopting the Investment Company Act, it exempted from that Act corporations subject to regulation under the Interstate Commerce Act.

As stated in *Newtex S. S. Corp.* v. *United States,* 107 F. Supp. 388, 392 (S. D. N. Y.) aff'd 344 U. S. 901 (1952):

> "* * * this is an injunction proceeding, and an injunction will issue only when it is necessary for the adequate protection of a plaintiff's rights. * * *
>
> "7. 'Suitors may not resort to a court of equity to restrain a threatened act merely because it is illegal or transcends constitutional powers. They must show that the act complained of will inflict upon them some irreparable injury.' United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 310, 49 S. Ct. 150, 152, 73 L. Ed. 390."

In *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939), Mr. Justice Frankfurter analyzes and clarifies the requirements that must be met in order to invoke the jurisdiction of a three-judge court under the Urgent Deficiencies Act. In that case, Mr. Justice Frankfurter points out that

> "[t]he requisites of equity have of course to be satisfied, but by the conventional criteria" (p. 136).

It is submitted that the plaintiffs in this case did not satisfy "the requisites of equity" in failing to show any irreparable damage to justify an injunction which has done irreparable damage to innocent third parties.

B. The District Court should have balanced the equities in determining whether the sweeping injunction below should have been granted.

> "A court of equity can never be justified in making an inequitable decree. If the protection of a legal right even would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its discreet and beneficent hand and remit the plaintiff to his legal rights and remedies." *McCann* v. *Chasm Power Co.*, 211 N. Y. 301, 305 (1914).

In granting partial supersedeas, Mr. Justice Harlan applied such equitable principles:

> "In weighing these equitable considerations against the plaintiffs' contentions, I am most impressed with the prejudice which continuance of this injunction will work on the preferred stockholders. Alleghany had about 136,000 shares of Class A preferred stock outstanding, all but about 24,000 of which were held by the general public. Approximately 130,000 shares of this stock have been delivered to Alleghany for exchange. 900,000 shares of the new preferred stock were issued in exchange for 90,000 of these shares before any action by the District Court. The temporary injunction bans the further transfer of those 900,000 shares by Alleghany or its agents, and also forbids the issuance of additional shares. Thus the 900,000 shares are not readily marketable or acceptable as collateral, and the holders of some 40,000 shares of the old stock are not able to receive from Alleghany the 400,000 shares of new stock to which they are entitled under the exchange offer. The value of the old preferred stock on May 1, even before the exchange was approved by the I. C. C., was in the neighborhood of $40,000,000, which is many times that of the plaintiffs' shares, presently valued at about $7,000. The plaintiffs own but 700 shares of

common stock out of approximately 4,600,000 shares outstanding, of which about 4,000,000 shares are publicly held; and 97½% of the common stock voting at the stockholders' meeting at which the preferred stock plan was approved (representing approximately 72% of the outstanding common) voted in favor of the plan" (R. 647-648).

While Judge Dimock's prevailing opinion granting a temporary injunction did not give consideration to the effect of the injunction order on the preferred stockholders, in denying a motion to stay the injunction he made this comment:

> "What makes the question perplexing is the plight of innocent stockholders who have given up their old preferred stock and have got a frozen asset in return" (R. 641).

Having thus indicated a sound reason for granting the stay, Judge Dimock disposed of the "plight of innocent stockholders" by casting blame upon the management of Alleghany (R. 641).

Mr. Justice Harlan took a different view, stating:

> "* * * I am not unmindful of the plaintiffs' contention that Alleghany proceeded with the preferred stock plan after notice of the plaintiffs' objection and proposed injunction suit, but I do not think this can be laid at the door of the preferred stockholders so as to disentitle them to consideration of their predicament" (R. 648).

The effect of the granting of the injunction upon the innocent third parties—the preferred stockholders—is such that it is fair to compare this situation with the one presented in *Forstmann* v. *Joray Holding Co.*, 244 N. Y. 22 (1926). There the plaintiffs sought the removal by injunction of a building erected partially on their land. The New

York Court of Appeals held that, though the building was in fact partially erected on the plaintiffs' land, equity required consideration of the fact that the defendants had spent a large sum of money which would be wasted if an injunction were granted. The injunction was denied because

> "* * * it would be inequitable to grant the injunctive relief given below in this case, for the reason that it would 'bear heavily on the defendants without benefiting the plaintiffs' " (p. 32).

The *Restatement of the Law of Torts,* Section 941 (1939), under the title "Relative Hardship," makes this comment:

> "When a plaintiff proves that a tort has been committed or is threatened and shows that other remedies will not make him whole, an injunction is not to be issued as a matter of course. Elementary justice requires consideration of the hardship the defendant would be caused by an injunction as compared with the hardship the plaintiff would suffer if injunction should be refused. * * *"

The Court below should have applied the test of relative hardship to this case particularly because the serious hardship which the injunction was bound to inflict would be visited upon concededly innocent third parties. Had it done so, the District Court would have left the appellees—who, at most, would suffer relatively insignificant harm by denial of the injunction—to their legal remedies (Cf. *Otis & Co. v. Pennsylvania R. Co.*, 61 F. Supp. 905 (E. D. Pa. 1945), aff'd 155 F. 2d 522 (3rd Cir. 1946)) and would and should have denied the injunction against the issuance, distribution and transfer of the new preferred stock.

CONCLUSION

The judgment of the District Court should be reversed in all respects or, in the alternative, to the extent that it enjoins, sets aside, annuls and suspends the orders of the Interstate Commerce Commission authorizing Alleghany to issue the new convertible preferred stock herein, and enjoins the issuance, distribution, transfer, etc. of said preferred stock.

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APPENDIX

Interstate Commerce Act, Part I:

Section 12(1), 24 Stat. 383 (1887), as amended, 49 U. S. C. 12(1), provides in relevant part:

> "* * * The Commission is hereby authorized and required to execute and enforce the provisions of this chapter * * *."

Sections 15(1) and (2), 24 Stat. 384 (1887), as amended, 49 U. S. C. 15(1) and (2), provide:

> "§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.—
>
> (1) *Commission empowered to determine and prescribe rates, classifications, etc.*
>
> "Whenever, after full hearing upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be there-

after observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

"(2) *Orders of commission.*

Except as otherwise provided in this chapter, all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction."

Section 15(2) was amended to read as above by 41 Stat. 485 (1920). Sections 15(1), (3) and (4), as they existed from amendment, 41 Stat. 485 (1920), until further amended, 54 Stat. 911 (1940), provided:

"§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.—(1) *Commission empowered to determine and prescribe rates, classifications, etc.* Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commis-

sion on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property or for the transmission of messages as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

"(2) * * *

"(3) *Establishment of through routes, joint classifications, joint rates, fares, etc.* The commis-

sion may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this chapter shall be subject to the laws and regulations applicable to transportation by water.

"(4) *Through routes to embrace entire length of railroad; temporary through routes.* In establishing any such through route the commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practic-

able through route which could otherwise be established: *Provided,* That in time of shortage of equipment, congestion of traffic, or other emergency declared by the commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Interstate Commerce Act, Part II:

Section 321(b), 49 Stat. 564 (1935), as amended, 49 U. S. C. 321(b), provides:

> "Except as otherwise provided in this chapter, all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

Interstate Commerce Act, Part III:

Section 915(d), 54 Stat. 946 (1940), as amended, 49 U. S. C. 915(d), provides:

> "Except as otherwise provided in this chapter, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended, modified, or set

aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

Interstate Commerce Act, Part IV:

Section 1016(c), 56 Stat. 296 (1942), 49 U. S. C. 1016(c), provides:

> "(c) Except as otherwise provided in this chapter, all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended, modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

Investment Company Act of 1940:

Section 3(c)(9), 54 Stat. 799 (1940), as amended, 15 U. S. C. 80a-3(c)(9), provides:

> "(c) Notwithstanding subsections (a) and (b) of this section, none of the following persons is an investment company within the meaning of this subchapter and sections 72(a) and 107(f) of Title 11:
>
> * * * * *
>
> "(9) Any company subject to regulation under the Interstate Commerce Act, or any company whose entire outstanding capital stock is owned or controlled by such a company: *Provided*, That the assets of the controlled company consist substantially of securities issued by companies which are subject to regulation under the Interstate Commerce Act."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

ALLEGHANY CORPORATION; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.; and ADELAIDE NEUWIRTH, on behalf of herself and all other common stockholders similarly situated,

Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT ALLEGHANY CORPORATION

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BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT ALLEGHANY CORPORATION

Introduction

The briefs filed by the Department of Justice, the SEC and the appellees contain few relevant matters which have not been covered in our main brief. However, some arguments are made to which a brief reply may serve the Court's convenience.

In the statement of questions presented, at page 4 of the appellees' brief, it is asserted that the SEC has recently found the proposed exchange offer to be "grossly unfair to the common stockholders" and this characterization is a recurrent theme in the brief. In addition, it is suggested at page 7 that "illegal personal profits totaling $4,862,000" were realized by the issuance of the securities challenged in this proceeding and this too echoes through the brief.

At the outset, it is fundamental that neither the fairness of the proposed exchange offer nor any of the colorful allegations of the complaint with respect to the realization of insiders' profits were considered by the District Court or are in issue on appeal to this Court. The judgment below does not rest in any degree on these claims which appellees feel they must now import to try to sustain it.

In its Findings and Opinion (rendered long after the judgment below and now on appeal) the SEC did not make the finding asserted by appellees. The SEC found only that on the "unclear and conflicting" basis of the record presented it could not make an affirmative finding of fairness. (Investment Company Act Release No. 2446 at p. 25; Appendix B, p. 60, SEC Brief). One Commissioner and the Staff of the Commission disagreed and affirmatively held that the exchange offer was fair (Id., p. 27; id. p. 61; Appendix to Reply Brief for Appellants Gruss, et al.).*

While appellees' brief does not even attempt to support the claimed "illegal personal profits totaling $4,862,000" with a record reference, the only possible source for this statement which we have been able to find is the allegation in paragraph 20 of plaintiff's supplemental complaint (R. 98), denied in Alleghany's answer and as to which no

*This question is, of course, not relevant to this appeal, and must await consideration of the appeal taken by Alleghany from the SEC order. Appellant believes that the SEC misinterpreted § 18 (e) of the Investment Company Act, and therefore reached an erroneous conclusion but we shall not argue that matter here.

evidence was received by the District Court, or the Phillips proxy statement annexed as Exhibit A to the original complaint (R. 39), which was stricken by order of the court dated December 23, 1955 (Item 6 b. of Alleghany's Notice of Appeal, R. 4). These statements and many others are totally unsupported and have repeatedly been denied. None can properly be considered here or be used to bolster the judgment when the court below explicitly disregarded them.

A.

The ICC Orders Were Not Reviewable Before a Three Judge Court in an Action Brought by Appellees

The cases cited by the appellees and by the Department of Justice do not sustain their contention that appellees had standing to obtain review of the status and preferred stock orders under the Urgent Deficiencies Act. The alleged "benefits and protection" of the Investment Company Act, listed at great length in Appendix B to the appellees' brief and of which the appellees claim the status order deprived them, are not limited merely to the holders of common stock. They extend to the holders of all classes of securities in such companies. Thus appellees have no interest in the regulation of Alleghany under the Investment Company Act different from that of the holders of all classes of stock of Alleghany and therefore fall squarely within the rule of *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 281 U. S. 479 (1930), and *New York Central Securities Corp.* v. *United States*, 54 F. 2d 122, 125 (S. D. N. Y. 1931), aff'd 287 U. S. 12 (1932).*

---

*In neither *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956), nor *Columbia Broadcasting System* v. *United States*, 316 U. S. 407 (1942), was an attack brought either by a minority stockholder or against an order of the ICC. In the *Storer* case, the attack was not brought under the Urgent Deficiencies Act.

The lumping by the Department of Justice of the preferred stock and status orders of itself neither shows the status orders reviewable nor the appellees to have standing to attack them. The *Pittsburgh & West Virginia* and *New York Central Securities* cases permit appellees only to attack such specific agency action as adversely affects them in their position as common stockholders. Nothing in those cases suggests that, even where a specific order directly affects a legally protected interest, a person may under the guise of reviewing that order, attack all prior administrative action underlying it.* Indeed, to permit such an attack would greatly weaken the restrictions set by this Court on the convening of three-judge courts under 28 U. S. C. § 2281.

> "The three judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended." *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 391 (1934).

See, also, *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 375-76 (1949); *Phillips* v. *United States*, 312 U. S. 246, 250-51 (1941).

Pittsburgh Plate Glass Co. v. *NLRB*, 313 U. S. 146 (1941), cited on page 21 of the Department's brief, is a particularly inappropriate authority for such an argument. Section 8(a)(5) of the National Labor Relations Act, 29 U. S. C. § 158(a)(5), provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees *subject to the provisions of section 9(a)*" (italics supplied). Section 9(a) (29 U. S. C. § 159(a)) gives the NLRB the power to designate an appropriate bargaining unit. Thus it is the specific terms of the Act that make the Board's designation of a bargaining unit reviewable on a charge of a refusal to bargain. This is far different from the curious theory of non-reviewable agency action "infecting" all subsequent actions taken with respect to the same parties so as to make them reviewable by a species of relation back.

American Power & Light Co. v. *SEC*, 325 U. S. 385, 389-90 (1945), which is claimed by the Department of Justice to give appellees standing before the three-judge District Court despite the holding of *Pittsburgh & W. Va. Ry. Co.* was not an action brought under the Urgent Deficiencies Act, and this Court looked specifically to the provisions of § 24(a) of the Public Utility Holding Company Act to determine whether the petitioners had standing to review an order of the SEC. Cf. *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432 (1946), a case arising under the Urgent Deficiencies Act.

Schwabacher v. *United States*, 334 U. S. 182 (1948), is not authority for the contention that the preferred stock order is reviewable at the suit of the appellees here. The question of standing was not even discussed by this Court. In that case the plaintiff stockholders were insisting upon rights specifically granted to them under the charter of their corporation. Here the claim of the appellees is that the exchange offer may result in dilution of their equity in the corporation at some indefinite future time without regard to what the value of their shares might then be, whereas the preemptive rights which would protect them against such dilution are specifically denied them in Alleghany's charter.

Even if appellees can attack the preferred stock and status orders under the guise of enforcing the Investment Company Act, or of prohibiting the regulation of Alleghany by a governmental agency not having jurisdiction, they cannot maintain their attack before a three-judge court. *Pittsburgh & W. Va. Ry. Co.* v. *United States, supra*, at page 488. Nor can the judgment of the court below survive as the judgment of a one-judge court since the plaintiffs failed to join directors and other necessary parties for such action by a one-judge court. *Cf. Goldstein* v. *Groesbeck*, 142 F. 2d 442 (2nd Cir. 1944); *Ashwander* v. *T.V.A.*, 297 U. S. 288

(1936). Moreover, the three-judge court did not conceive that it had the power to conduct a trial *de novo* as would a one-judge court. (Unprinted Record, pp. 1722-23).

The Department of Justice's position in supporting appellees' standing to obtain relief from an extraordinary three-judge court is in some contrast with its obvious and proper doubt about the validity of the injunction granted below. Implicit in its suggestion that the injunction can properly be vacated, vigorously rejected by the appellees, is recognition that it was actually used as a device to enforce the Investment Company Act, an entirely improper function for a special Urgent Deficiencies Act Court.

B.

Congress Has Determined that Broad ICC Regulation of Corporations Controlling Railroad Systems Is Essential.

In light of clear evidence of Congressional purpose, it is surprising that both the Department of Justice here (contrary to the Government's position below) and the SEC before the ICC should be so cavalier about the importance of ICC supervision over corporations controlling carriers within its conceded jurisdiction. This might be understandable in a contest for regulatory jurisdiction by an agency like the SEC which expected to inherit regulation of Alleghany. But success in the interpretation pressed here would not only oust ICC of important jurisdiction over a facet of the nation's transportation system and transfer jurisdiction over Alleghany, it might free companies holding railroad securities which are not potential regulated investment companies from any regulation.

As is demonstrated herein and in our main brief, ICC had the power under § 5 to subject Alleghany to regulation

under the Interstate Commerce Act and properly exercised that power to perfect its supervision over the New York Central System. This was recognized by the Government and the SEC until very recently. Not the least among the matters requiring the regulatory supervision of ICC over the affairs of Alleghany is the very matter challenged here —the issuance of securities by the parent carrier holding company. It would be of little use to provide, as does § 20(a) of the Interstate Commerce Act, for approval of the capital structure of carriers if the sound capital structure of the carrier system thereby sought to be fostered may be threatened by the financial requirements of the parent company resulting from its own uncontrolled issuance of securities.

It would not be correct to assume that any carrier controlling company, if not subject to ICC regulation, must automatically be an investment company and subject to the Investment Company Act. Actually the new-found enthusiasm of the Department of Justice for SEC regulation in preference to ICC regulation would oust more Federal regulation than it would assure. Such a result would frustrate the Congressional purpose to confide broad regulatory power over transportation facilities in the ICC.

A brief examination of the definitions contained in § 3 of the Investment Company Act (15 U. S. C. § 80a-3) demonstrates that more companies whose assets consist entirely of securities are not investment companies than are. Section 3(c) lists numerous substantial categories of non-investment companies, such as banks, insurance companies, bank holding companies and public utility holding companies. Furthermore, § 3(a)(3) of the Investment Company Act describes as an investment company one owning or holding "investment securities" in excess of 40 per centum of the value of its total assets other than cash and Government securities, but excludes from the term "investment securities" securities issued by majority-

owned subsidiaries. Accordingly, many companies can and do engage exclusively in the business of owning securities to the extent of 100% of their assets without regulation by SEC so long as at least 60% of these are securities of majority-owned subsidiaries.

However, under the decision below such a company or any large industrial or mercantile enterprise with a large amount of cash or other liquid assets, could achieve a dominant position similar to that of Alleghany over Central or to any one of a number of other carrier systems which are operated through a parent railroad holding company. However, so long as no additional carriers were added to the system, the dominant company of the carrier holding company complex would remain immune from regulation by the ICC in its relations with its subsidiary carriers, without any of the compensating advantages urged by the opposing briefs of regulation under the Investment Company Act.* Thus the present zeal in some of the briefs to terminate ICC regulation would have a disastrous effect on an object which has long been a subject of particular Congressional concern. Such a result is neither permissible nor desirable.

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*Much has been said in this case, particularly by the appellees, about the "benefits" and "protection" afforded to the stockholders of Alleghany by the Investment Company Act.

The fact is that the Interstate Commerce Act grants to the ICC more extensive powers of regulation over the issuance of securities than the Investment Company Act grants to the SEC. Section 20a(2) of the Interstate Commerce Act requires ICC approval of all security issues of carriers prior to their issuance. There is no comparable provision in the Investment Company Act. That Act itself prohibits certain types of securities and specifies terms of others, as in §§ 18 and 23, but requires no submission to the SEC before the issuance of securities. In the peculiar circumstances of the instant case, the SEC's basis for passing on the fairness of the preferred stock exchange order derived from § 6(c) of the Investment Company Act under which application was made for exemption from any applicable provisions of the Act which might otherwise forbid or limit the proposed issue of preferred stock.

C.

The Bridge Company Application Provided a Proper Jurisdictional Basis for ICC's Assertion of Regulatory Authority Over Alleghany

The Department of Justice urges (pp. 25-39) that the Bridge Company application provided no jurisdictional basis for ICC's asserting regulatory authority over Alleghany because Alleghany did not "acquire control" of the Bridge Company. There is a hole in the argument. It asserts that the "*merger* of the Bridge Company with another carrier in the Central system which owned all of its stock *did not affect either the extent of Alleghany's control over the Bridge Company or the manner in which such control was exercised*" (Gov't. Brief, p. 28; cf. pp. 25, 27).

This argument overlooks the fact that the Bridge Company application requested and received approval, not only of the Bridge Company—Big Four merger, but also of Central's undertaking direct operation of the Bridge Company's properties through a revision of the leasing arrangements between Central and Big Four.* Thus, giving effect to the leasing aspects of the transaction, Alleghany's former indirect control of the Bridge Company (through Alleghany stock control of Central, Central stock control of Big Four, and Big Four stock control of the Bridge Company) was replaced by control of the Bridge Company properties, now to be operated by Central. Even on the Department of Justice's own argument, if the true nature of the transaction was fully considered, jurisdictional requirements were satisfied.

The brief of the Department of Justice agrees that "Central may have 'acquired control' of the Bridge Company through the merger," but continues that (p. 29):

*It should be noted that the Bridge Company properties are not directly connected with any portion of the Central System (R. 227, and map at R. 596A).

> "it does not follow that Central's parent similarly acquired control. For the effect of the merger was to convert Central's indirect control (through the Big Four) of the Bridge Company into direct control, whereas the merger made no material change in Alleghany's indirect control of the Bridge Company."

The fact is, of course, that the effect of the leasing arrangements converted Alleghany's indirect control of Bridge Company properties to direct control, just as the effect of the merger converted Central's indirect control of Bridge Company properties to direct control. Thus, even under the Department of Justice's views,* the effect of the merger on Central and the effect of the lease on Alleghany are sufficient to justify invocation of jurisdiction, and they are governed by virtually identical and successive statutory clauses applicable respectively to carriers and non-carriers.

It is obviously this disregard of the presence of the leasing arrangements here involved, which led the Government's brief to distinguish *New York Central Securities Corp.* v. *United States*, 287 U. S. 12 (1932), on the untenable ground that a lease of properties was there involved. It says (p. 35, footnote 20) that "a lease of railroad properties by a carrier to its immediate parent involves a far more significant change in the latter's control of the subsidiary than any change in a holding company's control of an indirect subsidiary which may result from the subsidiary's merger with another indirectly controlled carrier." We submit that the change in Alleghany's control of the Bridge Company properties from stock control through a three-tier corporate hierarchy to control through operation

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*We doubt the validity of any distinction which depends on whether a "direct" or "indirect" control exists, and submit that the Bridge Company—Big Four merger, standing alone, represented an "acquistion of control" by Alleghany.

by a directly-controlled company by virtue of the leasing arrangements is a similarly significant change.

There is no basis for the Department of Justice's contention that, "when Section 5 speaks of 'acquisitions of control' by a non-carrier, it refers only to those acquisitions whose result is to combine previously separate carriers under common control" (Gov't Brief, p. 34). A primary error in this position lies in the assumption that there exist only clear cut situations in which a carrier is either "separate" or "under common control". ICC with its long and practical experience has made no such error. Nor has Congress.

Both ICC and Congress have been well aware that the nation's rail facilities consist, as to legal form, in a great congeries of carriers and that there is a constantly shifting relationship among them. Both have been equally well aware that ICC's power to supervise railroad unification would be stultified if ICC could pass only upon the relatively infrequent situations in which it is clear that a carrier passes from "separate" to "under-common-control" status. ICC has, since 1920, consistently asserted in literally hundreds of cases that it has power to pass upon the relatively more frequent situations in which existing control relationships among carriers have been altered in character, degree, or extent*. Congress, in substantially readopting in 1933 and 1940 the "acquisition-of-control" phrasing first used in 1920, has confirmed the correctness of ICC's construction. This Court in *New York Central Securities* has agreed that ICC has power under § 5 to pass upon changes in the character, degree, and extent of an existing control, even though such changes may be characterized as an "internal rearrangement of corporate structures".**

*See our main brief, pp. 81-82.

**It is not correct, as the Department of Justice now obviously assumes, that when a non-carrier in control of a system (as Alleghany controls the Central system) acquires a "separate" carrier, the matter is fraught with public interest, but that a non-carrier's rearrangement

The same unrealistic assumption vitiates the conclusions which the Government's brief draws from its discussion of legislative history. It has singled out for discussion those instances in which Commissioner Eastman and others, in discussing the need for the 1933 amendments, gave the most dramatic exposition of the need for ICC supervision of holding companies and their acquisition of rail carriers. But references to and even emphasis upon the most dramatic situations requiring the 1933 amendments cannot be thus converted, as the Department of Justice will have it, into a limitation on the powers actually conferred by Congress.

Congress gave no evidence that it made the same assumption the Department of Justice now does, and that it intended to grant ICC supervisory power over holding companies and their acquisitions only in the infrequent situation in which the holding company's acquisition converted a carrier from "separate" to "under-common-control" status. Congress repeatedly had its attention called to the fact that there are widely variant degrees of "control", as for example, that stock control of a carrier is but a "provisional form of combination" which "can be broken up

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of an existing "system" cannot involve a significant public interest. For example, in the present circumstances, Alleghany's acquiring control of a 21-vehicle motor carrier would enable ICC to invoke its § 5(3) powers, although such an acquisition would have little significance. On the other hand, Alleghany's merging into Central the Pittsburgh & Lake Erie (a large rail carrier controlled by New York Central but with considerable operational independence and with large amounts of publicly held stock) would have great significance in the public interest and would be a very important step in the railroad unification field.

The Department of Justice, in its brief to the court below, had a different and more realistic view than it now holds. The Department then said that "it is easy to imagine that the modification or change in the status of lines making up a system might very well be of great significance. It is for this reason that the Commission has construed the statute as requiring its approval of any modification in the composition of a system." (R. 128).

with relative ease", whereas a merger is a "permanent form of combination" which is "very difficult to undo" (H. Rep. 2789, 71st Cong., 3d Sess., pp. 69-71; see also, Hearings on H. R. 9059, pp. 31, 55-57). Dr. Splawn, whose views are definitive (see our main Brief, p. 78), obviously selected his words with care, and intended no arbitrary limitation on ICC's § 5 powers when he described the 1933 amendments as conferring power over a railroad holding company *"in so far as its activities affecting consolidation are concerned"* (Hearings, *supra*, at p. 19).

The Department of Justice reads too much into such statements as (to choose the one it apparently believes most strongly supports its position) the testimony of Commissioner Eastman that the 1933 amendments were intended to cure the weakness of § 5 in placing "no control on the activities of so-called holding companies *in effecting the unification of railway properties into systems.*" (Quoted, with emphasis supplied, in the Government's Brief, p. 33). It is unreasonable to believe that Commissioner Eastman intended to exclude ICC from jurisdiction over such holding company activities as causing the merger of a carrier subsidiary into its parent, thereby effecting a "unification" of railway properties in its truest and narrowest sense and in its most permanent form. Stock control of a carrier has very often proved ephemeral, and it cannot be said that the merger of two carriers, even where one has a working stock control of another, may not be fairly and accurately characterized as "effecting the unification of railway properties into systems." In any event, Commissioner Eastman at many points spoke of the purposes of the 1933 amendments as intending to grant ICC complete authority over the "process of railroad unification," without any qualification that the amendments reached only the combining of rail properties "into systems" (E.g., Hearings, pp. 57, 67, 250, 255, 261).

The Department of Justice's review of legislative history also omits the important fact that Congress acted in a desire to control, not only the unification activities of railroad holding companies, but the companies themselves, to the extent Congress felt able to reach them under then accepted views of constitutional limitations. For example, Congressman Rayburn, who guided the 1933 amendments to passage in the House and who quoted Commissioner Eastman's statement on which the Department of Justice relies, commenced his explanation of the bill by reading the President's statement that (77 Cong. Rec. 4856) "Railway holding companies should be placed definitely under the regulation and control of the Interstate Commerce Commission in like manner as the railways themselves." The desirability of ICC regulation of the securities of railroad holding companies was a recurring theme in legislative history. (E.g., ICC Forty-Fifth Annual Report to Congress (1931), pp. 85-86; 77 Cong. Rec. 4258). It is clear that Congress intended to grant broad powers to ICC to subject holding companies to regulation, and did not intend a restrictive interpretation of what constituted an "acquisition of control" of a carrier by a holding company, thus diminishing ICC's opportunities to impress regulation upon holding companies.*

Appellees, in support of their view (not urged and apparently not shared by the Department of Justice) that Alle-

*The Department of Justice's view (p. 29) that "the policy reasons relied on in the *Marshall* case are absent here" similarly overlooks the fact that a primary consideration in the 1933 amendments, and of this Court's decision in *Marshall*, was to enable ICC, at all suitable opportunities, to force regulation on holding companies. For reasons adequately argued in our main brief we believe that the ICC was clearly right in regarding this Court's decision in *Marshall* as a comprehensive guide to its application of the statute. This was also obviously the view of the Department in its argument in the court below (see R. 128). The present attempt by the Department of Justice to treat the *Marshall* decision as limited virtually to its own facts, improperly disregards long-continued and accepted administrative interpretation which is entitled to special weight when it is based upon a decision of this Court.

ghany's success in the New York Central proxy fight required ICC approval, now urge for the first time that the amendments to the Interstate Commerce Act, made by the Transportation Act of 1940, were intended and had the effect of subjecting to ICC approval the simple acquisition of control of a parent carrier as in a proxy contest, although unaccompanied by any rearrangement or alteration of its subsidiary and affiliated carriers. Appellees base this argument entirely upon a report (Sen. Rep. 180, 75th Cong., 1st Sess.) made by the Senate Committee on Interstate Commerce in 1937. (Appellee's Brief, pp. 63-73).

Appellees are inaccurate in suggesting that the Transportation Act of 1940, in making minor changes to the presently pertinent portions of § 5, was designed and intended to "close a loophole" in the 1933 Act which Senate Report 180 revealed. There is no traceable relationship between the changes effected by the 1940 Act and Senate Report 180. Appellees disclose no single line (nor have we found any) in the very extensive legislative background of the Transportation Act of 1940 which suggests an intention to deal with the problems discussed by the three-year earlier Senate Report 180.* Appellees overlook that Senator Wheeler, who introduced S.2009, which became the Transportation Act of 1940, introduced at the same time S.2016, which dealt extensively with railroad holding companies and was obviously an outgrowth of the earlier Senate Report 180. S.2016 died in committee, without any hearings or reports.

Appellees' primary argument (Appellees' Brief, pp. 67-70) is that the revision of language in the prohibitory paragraph (4) of § 5 was intended to "close the loophole" allegedly uncovered by Senate Report 180, and to subject

*The Transportation Act of 1940 derived from the recommendations of two presidentially-appointed committees (the "Committee of Three" and the "Committee of Six"). Its history is reviewed in some detail in *Railway Labor Executives Assn.* v. *United States*, 339 U. S. 142 (1950).

to ICC approval the transfer of control of any rail carrier which happened to have a subsidiary. This revision of language was the product of a Conference Committee, the bill which became the Transportation Act of 1940 having passed both houses without any alteration to the prohibitory paragraph. The Conference Committee gave no reason for this specific change, but did, in the course of explaining other changes in § 5, remark that there were certain further "clarifying changes." (H. Rep. 2832, 76th Cong., 3rd Sess., pp. 68-69). It is impossible to conclude that the Conference Committee, in a slight revision of language which it described, if at all, as a "clarifying change", was in fact fundamentally revising § 5. ICC, intimately familiar with Congressional purpose, has not so construed it.

Appellees incorrectly represent the *Chesapeake & Ohio Railway Co. Purchase* case, 261 I. C. C. 239. They assert (Appellees' Brief, p. 75) that the case involved an application by Alleghany "for authority to acquire control of the single system represented by the C. & O., Pere Marquette and Nickel Plate and their subsidiaries", and that ICC's 1945 order "was pursuant to this application (and not the application by the C. & O., in which Alleghany joined, for the C. & O. to acquire the properties of its wholly owned subsidiary, Norfolk Terminal Co.)."

The ICC opinion makes clear that there was not before it an application such as appellees describe.* Alleghany's only application before ICC (an earlier and defective application such as appellees describe having been dismissed on

*Nor was there, as appellees state, an "Alleghany stipulation to this effect", i. e., to the effect that ICC should proceed as though Alleghany had applied for authority to control C. & O. and other carriers. Appellees possibly refer to an affidavit by Mr. Young, submitted in connection with the C. & O. proceeding, which indicated Alleghany would not object to a requirement that non-C. & O. system carrier stocks be trusteed by it, but which, by no stretch of words, could be interpreted as a quasi-application by Alleghany to acquire control of C. & O. and other carriers.

Alleghany's request) was for authority to acquire control of the properties of the Norfolk Company, through control of C. & O. This application ICC construed as one for authority to continue control of C. & O. and other carriers (261 I. C. C. at 244-245, particularly footnote 2).

ICC's definitive statement as to its jurisdiction was (pp. 260-261):

> "* * * The two applications contemplate a change of existing control, in that the Chesapeake & Ohio would control, through purchase, the properties of Terminal, instead of control through stock ownership and by lease, and Alleghany's control of the two companies would likewise be changed. Such 'internal rearrangement of corporate structure' must have our approval under section 5 (2) of the act or be unlawful. [Citing cases]. This is true whether Alleghany's present control of Chesapeake & Ohio and its affiliated companies be regarded as a lawful continuation of preexisting control or an unauthorized resumption of interrupted control. It is, therefore, unnecessary to determine this question in taking jurisdiction in the present case."*

There was no clearer way of stating that the C. & O. application as to Norfolk (substantially identical with Central's application as to the Bridge Company, and similarly joined in by Alleghany) was, alone and of itself, an adequate jurisdictional basis. ICC never held, as appellees would have it, that an application by Alleghany was necessary to acquire control of an integrated C. & O. system

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*Its 1945 order, in authorizing continued control by Alleghany of C. & O. and other carriers, was ICC's means of putting to rest its investigation in Docket No. 29085 as to whether Alleghany had illegally acquired control of C. & O. and the others. Throughout the period Alleghany controlled a motor carrier so that, if it lost and then reacquired control of C. & O., a § 5 application was necessary. This was the pith of the Examiner's proposed report although he made the other suggestions previously noted.

(Appellees' Brief, p. 76). ICC did hold, despite appellees' denials (Appellees' Brief, p. 75), that its authority to declare Alleghany a carrier could be predicated solely on the application involving the Norfolk Company.

D.

The Big Four and the Companies in the Boston and Albany Case Were "Carriers" Within the Meaning of § 5(2)

Appellees have argued here—although concededly not before the District Court—that "the Big Four and the companies in the Boston and Albany proceeding are statutory 'lessors', not 'carriers' " and that "ICC has no jurisdiction under § 5(2)(a)(i) to approve acquisitions of control of 'lessors' " (Appellees' Brief, pp. 90-92). The chief vice in this argument is that even if a railroad be a § 20 "lessor" (the section appellees contend controls lessors), it is nevertheless still a § 5 "carrier". Section 20(8) contains its own definition of carrier and lessor for § 20's limited purposes.* It does not, however, purport to override the broader definition of carrier in § 1(3) and the case on which appellees rely, *Group of Boston & Providence R. R. Corp. Stockholders* v. *ICC*, 133 F. Supp. 488 (D. Va. 1955), at 494, aff'd. 350 U. S. 926 (1956), does not support their claim that if a company is a "lessor" it is not "therefore a 'carrier' within the meaning of Part I of the Act" (Appellees' Brief, fn. 15, p. 91). That case related to ICC's power under §§ 1(4) and 15(c) of the Interstate Commerce Act to fix rate divisions between various carriers in one system and the District Court there concluded that under the proper

*By similar reasoning, appellees at p. 76 of their brief incorrectly attempt to equate "carriers" under § 20a(12) with § 5 carriers.

interpretation of these sections ICC had correctly decided that the "lessor" was not entitled to have rates of its own.

In reaching that result, the Court did not find that the lessor was not a carrier, but merely that it was not an "independent carrier in actual transportation" (p. 494). Nor had the Commission found that the "lessor" was not a carrier. ICC had simply found that the "lessor" railroad "does not qualify as a carrier entitled to rates" (p. 490). At least inferentially, both ICC and the District Court actually recognized that the lessor was in fact a carrier. The Court upheld the Commission's "opinion that the compulsions of the Act applied only 'to carriers actually engaged in the transportation of passengers or property' ". This recognition that there may be carriers not actually so engaged is compelled by, and implicit in, § 1(4) itself, which statute requires certain carriers, to-wit, "every common carrier subject to this chapter engaged in the transportation of passengers or property", to provide and furnish transportation, upon reasonable request therefor. If all common carriers "subject to this chapter" refers only to those actually engaged in the transportation of passengers or property, there would be no need for these limiting words in § 1(4). Whether or not a railroad is a lessor for other purposes is not germane to a determination of its "carrier" status for § 5 purposes. Section 5 makes no distinction between those carriers which are lessors and those which are not. The Big Four and the railroads in the Boston and Albany proceeding clearly met the § 1(3) test of carriers and an acquisition of control over these railroads is within the purview of § 5. In any event, the Bridge Company, control of whose properties and franchises was acquired by Alleghany and Central in the Bridge Company proceeding, was clearly a "carrier", owning and operating transportation facilities, and not a "lessor company".

E.

If the ICC Bridge Company Orders Did Not Validly Continue Jurisdiction over Alleghany, Such Orders Could Not Effectively Terminate the ICC 1945 Order

The brief of the Department of Justice (pp. 38-39) makes no claim that the 1945 order of the ICC terminated automatically when Alleghany divested itself of control of C. & O. in 1954. Instead, the Department of Justice argues that the 1945 order was "terminated" by the order of Division 4, dated March 2, 1955, in the Bridge Company merger proceeding, which order was affirmed on May 24, 1955 by the order of the full Commission. The conclusion reached is that the 1945 order, having been thus terminated, could not form the basis of jurisdiction over Alleghany by the ICC at the time of its May 26 and June 22, 1955 orders approving the preferred stock issuance.

As stated in our main brief (p. 51) the ICC obviously intended to terminate its jurisdiction over Alleghany as a carrier, under its 1945 order, only because of its continuation of jurisdiction over Alleghany pursuant to the March 2, 1955 order. This is perfectly clear from the provisions and sequence of paragraphs in the order and is made explicit in the report, which refers to the 1945 order as being "superseded" (R. 441). The paragraph in the order terminating the 1945 order comes immediately after a paragraph in which the Commission specifically continues jurisdiction over Alleghany. It is fanciful to consider that the ICC would have terminated its jurisdiction under the 1945 order had it suspected that the jurisdiction provisions of the March 2, 1955 order might later prove ineffective. Proper recognition of the serious purposes of regulatory authority should preclude wrenching one paragraph out of context and treating that as definitive action when considera-

tion of the entire order clearly refutes any such interpretation.

Moreover, the March 2, 1955 order of Division 4 and the May 24, 1955 order of the ICC affirming the former order were, insofar as they took jurisdiction of Alleghany as a carrier and terminated the 1945 order, "enjoined, set aside, annulled and voided" (R. 555) by the District Court's final judgment of December 23, 1955. If such annulment by the court was effective to deprive the ICC of the jurisdiction over Alleghany asserted by 1955 orders, the annulment was equally effective to render void that portion of the orders which "terminated" the 1945 order.

After the appeal to this Court appellees moved in the District Court for amendment of its judgment so as to set aside that portion of the March 2, 1955 ICC order which took jurisdiction over Alleghany as a carrier, and at the same time to affirm that portion of such order which "terminated" the 1945 order. The District Court denied the motion with an ambiguous opinion rendered December 6, 1956. Any action other than denial of the motion would have been clear error. A court has no power to set aside one portion of an order of an administrative agency and at the same time affirm another interrelated portion of the same order. Analogous procedure was condemned by this Court as usurpation of "an administrative function" in *FPC* v. *Idaho Power Co.*, 344 U. S. 17 (1952). See also *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940) and *FTC* v. *Morton Salt Co.*, 334 U. S. 37 (1948).

Had the ICC in the present case been instructed by the District Court that the portion of the March 2, 1955 order taking jurisdiction over Alleghany as a carrier was invalid, it is beyond doubt that it would never have "terminated" its jurisdiction which it acquired under the provisions of the 1945 order. Either through modification of its Bridge order or its Boston and Albany order it obviously would

have taken whatever steps were necessary to retain jurisdiction and carry out its conception of the Congressional purpose.

The SEC's Brief (p. 7) may leave an inference that Alleghany agreed that it would submit to the jurisdiction of the SEC under the Investment Company Act without further hearing if the ICC 1945 order should be terminated for any reason or in any manner. Any such inference is incorrect. As appears from Alleghany's motion to postpone the SEC hearing in its July 1954 proceeding (Appendix E to SEC Brief, p. 70) Alleghany stated that it would submit to the jurisdiction of the SEC under the Investment Company Act only if the ICC should terminate its 1945 order and should not continue to subject Alleghany to regulation under the Interstate Commerce Act by another order as was then contemplated. Alleghany (and indeed the SEC prior to its brief filed with this Court) have consistently taken the position that the termination of the ICC's 1945 order by its March 2, 1955 order did not terminate ICC's jurisdiction over Alleghany, but that the ICC merely substituted jurisdiction under the 1955 order for that previously acquired under the 1945 order. The history of the SEC's efforts to persuade ICC in its discretion to surrender jurisdiction is inconsistent with any such inference as now seems to be suggested.

F.

The SEC 1945 Order by Its Terms Continued Until Revoked

The SEC in its brief (p. 16) takes the surprising position that its 1945 order terminating Alleghany's registration under the Investment Company Act should not be taken seriously any longer. In this respect the SEC argues that its 1945 order automatically lapsed at some indeterminate period "when Alleghany ceased to be subject to

regulation by the ICC" without a formal order of revocation by the SEC, in spite of the fact that the 1945 order provided that if Alleghany were to cease to be subject to regulation under the Interstate Commerce Act, such order "may be revoked, suspended or modified after appropriate notice and opportunity for hearing" (R. 185-186).

The SEC further argues that when its 1945 order automatically lapsed Alleghany thereupon became an unregistered investment company, with the result that substantially all of its transactions were rendered invalid by § 7 of the Investment Company Act. The SEC's brief does not explain why the claimed invalid transactions are not within the exculpatory provisions of § 38(c) of the Investment Company Act, which read as follows:

> "(c) No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

SEC's position is an afterthought and is incorrect. Certainly, when it issued an order in July 1954, convening a hearing in a proceeding to determine whether Alleghany was subject to regulation under the Investment Company Act or the Interstate Commerce Act, and whether the SEC's 1945 order should be revoked, suspended or modified (SEC Brief, Appendix C) it would seem apparent that the SEC was not of the opinion that its 1945 order could automatically lapse merely by reason of changed factual conditions regarding Alleghany.* The same may be said with re-

*The SEC's present position is also inconsistent with its acquiescence in the commencement of "when-issued" trading in the new preferred stock on the New York Stock Exchange. See our main brief, p. 41.

spect to the SEC's attitude in July through October 1954 when it was believed necessary for Alleghany to stipulate on three occasions with the SEC that in the event the ICC should determine that Alleghany was not to be regulated as a carrier prior to the determination of the SEC proceeding, Alleghany would conduct itself as if it were a registered investment company until the SEC had determined its status. The considerations against lapse of orders advanced in our main brief (pp. 38-9, 52-5) apply to the SEC present support of this erroneous conception.

While the need for these stipulations if the SEC's present position is correct is not explained, we submit that the cases of *In re The United Corp.*, 128 F. Supp. 725 (D. Del. 1955), which SEC's Brief specifically endorses (fn. 9, p. 18), and *SEC* v. *Long Island Lighting Co.*, 148 F. 2d 252 (2nd Cir. 1945), discussed in our main brief, which hold that SEC orders declarative of the status of companies once subject to their jurisdiction remain effective until revoked, furnish adequate reason.*

G.

Alleghany Was Subject to Full and Continuous Regulation By the ICC

The SEC brief takes the position (pp. 14-15) that Alleghany cannot come within the exception of § 3(c)(9)

*As for the contention that *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (2nd Cir. 1948), in some manner overruled the *Long Island Lighting* case, it is perhaps sufficient to note that the SEC places greater reliance on the *Seatrain* case than did the author of the opinion therein, Judge Frank, in the opinion below. That case involved no order declaratory of the status of any party thereto, as did the *Long Island Lighting* case, but only the question of whether an injunction against instituting a new shipping rate should issue at the behest of the Maritime Commission pending decision by the Commission on the fairness of the proposed new rate.

of the Investment Company Act unless it has been granted carrier status under § 5(3) of the Interstate Commerce Act and thus is subject to continuing regulation by the ICC under §§ 20 and 20a. This point is covered in our main brief at pages 55-57.

Not only did the ICC in its 1945 order in the C & O proceeding and in its 1955 orders in the Bridge Company proceeding provide that Alleghany should have carrier status under § 5(3). It also declared in the Boston and Albany proceeding that Alleghany had theretofore been subjected to carrier status under § 5(3), and in effect incorporated by reference its earlier (March 2, 1955) § 5(3) order, pointing out that it had subjected Alleghany to carrier status in specific respects in that order (R. 453).* Consequently, even on the basis of the order in the Boston and Albany proceeding (the validity of which was not questioned by the District Court) Alleghany is "subject to regulation under the Interstate Commerce Act", and therefore exempt from the Investment Company Act under § 3(c)(9) thereof.

It would exalt form over substance to treat the Boston and Albany order as not regulation of appellant by the ICC merely because it did not consider it necessary to repeat a formula which had been used only twenty days before. If the concept of "mumbo-jumboism" is sufficiently elegant to use in connection with administrative action, it surely would be a form of deference to that primitive technique to

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*Alleghany's application to the ICC in the Boston and Albany proceeding specifically requested an order, containing, among other things a condition that Alleghany "shall continue to be considered a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Act, as provided by Section 5(3) thereof" (R. 594). As indicated in the text above, the ICC in effect granted that request by referring to its previous order of March 2, 1955 in the Bridge Company proceeding where it had provided that Alleghany be considered as a carrier subject to the same sections of the Act.

let the effectiveness of the Boston and Albany order turn upon the presence or absence of a particular incantation.

Thus, since there was continuous regulation by the ICC from 1945 until the injunction below, it is unnecessary to decide whether Alleghany should be regarded as "subject to regulation" if there had been any significant hiatus in regulation. Here there was none.

H.

ICC Made Plain Findings on Ample Evidence that Alleghany Controlled Central When the ICC Issued its Status Orders

Nowhere is appellees' unwillingness to confine themselves to the record facts more apparent than in Point II, where they argue that Alleghany did not acquire control of Central.* Earlier, at page 36 of Point I, they apparently contend that Alleghany, in order to support its "claim for standing to apply for the status order", did acquire control

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*The Department of Justice's brief does not take this position, but merely "assume(s) *arguendo* that Alleghany possesses 'control' over Central, as appellants contend" (Gov't's Brief, fn. 15, p. 27). The joint brief of the Department of Justice and the Interstate Commerce Commission filed in the District Court went beyond mere *arguendo* assumption and agreed with appellants' contention that Alleghany controlled Central. That brief stated:

> "It is submitted that in determining corporate control the test is a realistic appraisal of facts by the expert body familiar with the realities of rail intercorporate control. * * * In *Rochester Tel. Corp* v. *United States,* 307 U. S. 125 (1939), * * * the Supreme Court held that such control was not to be determined by any artificial test, but by the special circumstances of each case, and that the Commission's determination should be sustained if there was a rational basis for its conclusion. * * * It is submitted here that the findings of the Commission fully warranted it in reaching the determination it did that Alleghany had control of Central within the meaning of Section 5 of the Interstate Commerce Act." (R. 131-132).

of Central, and did it "by violating the prohibitions of Section 7(a) of the Investment Company Act".

In their Point II, however, appellees point to the ownership of Central shares by Messrs. Murchison, Richardson, Kirby and Young, and conclude that perhaps these four men, acting in concert, control Central, but that Alleghany's "11,400 Central shares, with a market value of less than $270,000" (Appellees' Brief, p. 44), certainly do not. The record shows that on the date of its § 5 application to ICC, Alleghany had voting rights in 615,500 shares of Central stock (almost 10%) (R. 217); that by December 31, 1954 Alleghany could vote 886,000 Central shares (R. 263); and that by April 19, 1955 (before the full Commission issued its status order) it had voting rights to 987,000 Central shares, over 15% of all outstanding Central stock (R. 161).

The argument that Messrs. Young, Kirby, Murchison and Richardson control Central is the more surprising since appellees have made or endorsed a wide variety of contradictory allegations as to who controlled Central. Initially, it was plain that Alleghany was in both factual and legal control of Central, and it was even stressed that Alleghany "admits its present control of the New York Central and its constituent companies" (R. 272). Next, while still conceding Alleghany's factual control of Central but for purposes of emphasizing the illegality of that control, appellees pushed with vigor the view that Alleghany not only acquired factual control of Central but was constantly tightening that control.* Next, appellees shifted

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*". . . Alleghany Corporation and its nominees . . . by stock purchases and the solicitation of proxies and other acts in interstate commerce, sought to acquire and did acquire control of the applicant railroad and bridge companies herein.

"By reason of said prohibited and unlawful acts, Alleghany Corporation and its nominees were successful in acquiring on June 14, 1954 the control of the New York Central Railroad. . . ." (R. 322).

to the view that neither Alleghany nor its officers controlled Central, but that "mathematical, actual and legal control" of Central resided in Central's 12 non-Alleghany directors (R. 395). Not until the seventh and final pleading to ICC did appellees contend that it was Young and Kirby who "with their associated nominees secured control [of Central] in their *individual* and not in their corporate capacities" (R. 539).*

There should be some end to giving serious attention to appellees' pattern of repudiating previous positions as to control of Central. The matter certainly is hardly open for *de novo* consideration here. Our main brief (pp. 92-95) contains a complete reference to the portions of the record which sustain the sufficiency of the ICC's findings that Alleghany controls Central.

I.

Appellees Were Not Entitled to Any Hearing Beyond That Accorded Them by the ICC

The court below, in holding that the ICC did not accord appellees an adequate hearing, relied largely on § 17(3) of

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*This does not exhaust the catalogue of positions appellees took. Another argument was that Chesapeake & Ohio, Murchison, Richardson and Murchison Brothers had participated with Young and Kirby in effectuating control of Central and Chesapeake & Ohio in a common interest. (R. 323).

The shifts in appellees' allegations as to Central's control were made, of course, to accommodate their shifting legal arguments why Alleghany's applications require denial. In their complaint (R. 32-38) and supplemental complaint (R. 94-100), appellees made no statement whatever as to the control of Central.

These contentions appeared in a motion accompanying, and referred to in, a petition to intervene before ICC dated February 4, 1955. Appellee Phillips joined Breswick in reaffirming and reurging this contention on April 11, 1955 by again seeking intervention in both the status and preferred stock dockets "for the reasons set forth in the petitions for intervention filed on January 11, 1955, February 4, 1955, February 21, 1955, and March 29, 1955" (R. 491)

the Interstate Commerce Act. As shown at pp. 88-89 of our main brief, § 17(3) has no bearing on the question. Significantly, appellees make no attempt to sustain the reasoning of the decision below; they do not even mention § 17(3).

The Department of Justice has at no time voiced any doubt as to the adequacy of the hearing. In the court below the Department pointed out that a hearing was discretionary with the ICC and that such discretion was properly exercised here, especially since appellees were merely seeking to go into collateral issues having no relevancy to the questions before the Commission (R. 132-133). The Government brief in this Court does not even argue the point.

Appellees' views were fully presented and considered by ICC in both the status and preferred stock proceedings. They filed seven different pleadings with the ICC, and countless briefs as well as evidentiary affidavits (R. 269-281, 317-324, 392-410, 448-449, 478-480, 489-492, 537-544). After the decision by Division 4 of the ICC in the status proceeding, appellees petitioned for, and were granted, a complete reconsideration of the matter by the full Commission, which in addition granted their petition to intervene (R. 506-515, 517). The ICC decided, however, that there was no need to order a hearing since appellees were concerned primarily with the legal question of the interpretation of the Interstate Commerce Act and its application to facts already disclosed in the proceedings (R. 508).*

Appellees argue (Appellees' Brief, pp. 96-105) that they were entitled to a further hearing in the status proceeding

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*Even where, unlike the present case, there is a statutory requirement of a "full hearing" this Court has held that such a hearing is not required upon an application that states no valid basis for a hearing. *U. S.* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956).

for two reasons:* (1) Such hearing was due them as a matter of right under § 5(2)(b) of the Interstate Commerce Act; and (2) § 5(2)(b), if not so interpreted, permits deprivation of property without due process of law and is unconstitutional.** These arguments will not stand analysis.

(1) Our main brief (pp. 86-91) discussed fully § 5(2)(b) which requires a public hearing in the case of a transaction proposed under § 5(2)(a) only "if the Commission shall consider it necessary", and in addition expressly gives the Commission discretion to dispense with public hearings in cases where carriers by railroad are involved if the Commission determines, as it did in the present case (R. 416, 508), "that a public hearing is not necessary in the public interest."

The provision in § 5(2)(b) relied on by appellees to the effect that the ICC "shall afford reasonable opportunity for interested parties to be heard", was fully satisfied in the present case; as already shown, the ICC received from the appellees repeated and extensive presentations of their

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*Appellees concede (Appellees' Brief p. 28) that they were not entitled to an evidentiary hearing as a matter of right in the preferred stock proceeding, as to which § 20a(6), of the Interstate Commerce Act governs.

**Appellees' additional argument that the Administrative Procedure Act independently required a further hearing, regardless of the discretion conferred on ICC in § 5(2)(b) of the Interstate Commerce Act, has already been shown untenable in our main brief (p. 91, fn.). As there demonstrated, and as held in *Cook Cleland Catalina Airway* v. *CAB*, 195 F. 2nd. 206, 207 (D. C. Cir. 1952), the Administrative Procedure Act merely prescribes the hearing procedures to apply where a hearing is otherwise "required by statute." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), cited by appellees, does not hold otherwise, since in ICC proceedings of the character here involved, unlike the deportation proceeding involved in the *Sung* case, no hearing beyond that which was accorded by the ICC is required either by statute or by due process.

views.* (R. 269-281, 317-324, 392-410, 448-449, 478-480, 489-492, 537-544). As this Court held in *FCC* v. *WJR, The Goodwill Station,* 337 U. S. 265, 283, fn. 17 (1949), such a provision does not nullify discretion given to the agency by Congress as to the manner in which the opportunity to be heard is to be afforded, but "only assures the right to participate . , . in the manner reasonably found by the Commission to be appropriate."

Appellees argue (Br. p. 102) that the discretion given the ICC as to hearings by § 5(2)(b) is limited to "cases where carriers by railroad are involved" and that this was not such a case. The argument is that although some of the parties in the ICC proceedings (such as New York Central and the Bridge Company) were admittedly "carriers by railroad", Alleghany, Big Four and the companies in the Boston and Albany proceeding were not "carriers by railroad" but were a non-carrier and "lessors" and therefore hearings were not discretionary as to them.

This argument is too insubstantial to warrant extended comment. As pointed out previously, even "lessors" are "carriers" for purposes of § 5. Even if that were not true, however, it would not follow that if there are any non-carrier or lessor parties in a proceeding for a merger of two railroads, the case ceases to be one "where carriers by railroad are involved". Appellees' construction of the statute would also mean that the ICC would be required to accord public hearings as a matter of right on applications of non-carriers or railroad lessors although empowered to dispense with hearings on applications of carriers

*Appellees' contention that they were not given notice of Alleghany's application for approval of stock control of three carriers by Central in the Boston and Albany proceeding is of no legal consequence. Section 5(2)(b) requires that notice in such cases be given only to the Governors of each state in which the carriers involved are situated, and to the carriers themselves. Clearly the ICC is not required to send notices to each of the stockholders of each of the carriers and non-carriers involved in a transaction before it.

by railroad. The argument not only leads to a wholly incongruous result but defeats itself by proving too much. The pertinent portion of § 5(2)(b) reads as follows:

> "If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest."

It is to be noted that the portion of the above quotation preceding the semi-colon confers discretion generally without mention of "carriers by railroad". It is only the portion following the semi-colon which mentions carriers by railroad. If appellees' argument were accepted, the portion following the semi-colon would have no application to Alleghany or any railroad lessor, so that as to them the question of a hearing would be governed entirely by the provision preceding the semi-colon which requires a hearing only "if the Commission shall consider it necessary".

The fact is, as shown in our main brief (p. 89), that the objective of the 1949 amendment to the Interstate Commerce Act was to make hearings discretionary in all railroad cases, just as they already were in cases involving motor or water carriers, without regard to the technical status of different parties in the case.

(2) Appellees' argument that § 5(2)(b), if not given the interpretation for which they argue, would be unconstitutional is equally without merit.*

*The cases cited by appellees for this proposition (Appellees' Brief, p. 98) are not in point. The *Morgan* cases, 298 U. S. 468 (1936) and 304 U. S. 1 (1938), dealt with the interpretation of a mandatory statutory requirement of "full hearing" in the Packers and Stockyards Act of 1921 (7 U. S. C. §§ 181-229), and the Court expressly declined "to consider the constitutional requirement of due process as to notice and hearing." 298 U. S. at 477. Moreover,

To state the appellees' argument is to eliminate any necessity for extended rebuttal. As this Court pointed out in *FCC* v. *WJR, The Goodwill Station*, 337 U. S. 265, 276 (1949), the Constitution "has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings" and "to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind." The procedure provided by Congress in § 5(2)(b) pursuant to which the appellees made a full presentation of their views in pleadings and briefs, as well as in evidentiary affidavits, was as much as they could properly ask. Their interest was too indirect and insubstantial, and their position was too shifting and self-contradictory, to warrant the severe burden upon and delays in the administrative process which compliance with their demands would have imposed. Nor is there any basis for

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the alleged deficiences in the hearing accorded in those cases, as in all the cases cited by appellees, were in no way related to those asserted by appellees in the present case. In *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274 (1924), and in *ICC* v. *Louisville & N. R. Co.*, 227 U. S. 88 (1913) the Court was again concerned solely with the interpretation of statutory provisions which made a "full hearing" mandatory rather than discretionary. In *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349 (1936) the Court was dealing with the wholly unrelated question as to the right to judicial review of findings of fact made by the ICC in ordering a division of joint rates where an issue is presented as to whether the rate division is confiscatory and violates substantive due process. In *The Chicago Junction Case*, 264 U. S. 258 (1924), the Court was dealing with the mandatory hearing requirement in § 5(2) of the Transportation Act of 1920, before the 1940 amendment involved in the present case making hearings discretionary, and the issue was again solely one of interpretation of that statute, not due process. The remaining case cited by appellees, *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950) was concerned with the quite different question whether the hearing procedures prescribed by the Administrative Procedure Act apply to a deportation hearing involving, in the words of the Court at p. 50, "issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."

appellees' claim that ICC here abused the discretion given it by Congress.

Here, as in the *WJR* case (337 U. S. at p. 284) the appellees have not shown that they were denied any opportunity to present to the Commission any significant matter of fact or law. They assert (Appellees' Brief, pp. 99, 103) that if given a further hearing they would have proved that Alleghany did not control Central alone but only in conjunction with certain individuals, which fact they say would have negated the ICC's jurisdiction in the merger proceeding. The facts are that the appellees' views as to Alleghany's control over Central were repeatedly and voluminously presented to the Commission; that in an early pleading appellees made the contrary assertion that Alleghany did in fact control Central (R. 322); that appellees made no offer to prove lack of Alleghany control until their seventh and last pleading in the ICC, when they made such an offer of proof in the preferred stock proceeding (R. 538-39), in which not even appellees contend that a hearing was mandatory and in which the matter was of no relevance.

J.

The Court Below Erred in Enjoining Alleghany's Preferred Stock Issue

Our main brief (pp. 96-98) demonstrated that the District Court exceeded its jurisdiction, as a specially-constituted three-judge court under the Urgent Deficiencies Act, when it not only set aside orders of the ICC, but went on to prevent all activity of Alleghany with respect to the new preferred stock as in violation of the Investment Company Act, despite the fact that all of the stock had been issued, and much had been transferred.

The position taken in the Government's brief on this point is significant. That brief, which adopts the views of

the appellees on certain of the other issues, states (p. 40) that the validity of the District Court's injunction against the issuance or transfer of the new preferred stock is a "difficult question". Indeed the Department of Justice finds the question so difficult that it suggests that the injunction should be vacated. It suggests that Alleghany will "presumably" be deterred from consummating the preferred stock exchange without the injunction by the threat of the penalties provided in the Investment Company Act.

We welcome the Government's recognition that the injunction should be vacated and submit that the Government's brief makes additionally clear the soundness of our position that the judgment below is a jurisdictional nullity and should be reversed.

In attempting to justify the District Court's injunction against consummation of the exchange offer, the appellees point to *The Chicago Junction Case*, 264 U. S. 258 (1924), later distinguished in *Pittsburgh & W. Va. Ry. v. United States*, 281 U. S. 479 (1930), as establishing the power of a court under the Urgent Deficiencies Act to grant relief other than the setting aside of ICC orders. Those cases establish nothing more than the power to grant limited ancillary relief to make the setting aside of an ICC order effective.

The relief granted here was not of that character. The questions as to whether Alleghany was subject to the Investment Company Act, and whether it had violated that Act, were questions separate and apart from the question of the ICC jurisdiction which was before the District Court. Contrary to the appellees' assertion that there is nothing in the District Court's opinion or judgment to indicate that its injunction was based on violations of the Investment Company Act (Appellees' Brief, p. 115), the District Court expressly found (R. 657) that Alleghany was within the coverage of the Investment

Company Act, that the SEC 1945 order terminating Alleghany's registration under that Act had ceased to have any effect, and that Alleghany's issue of new securities violated § 7 of that Act.

The gravamen of Appellees' complaint was alleged violation of the Investment Company Act (R. 99, Par. 24). Counsel for appellees, in arguing for a temporary injunction conceded it (R. 87). Indeed, he said that he was in Court "* * * * in the right of the Securities and Exchange Commission * * *" (R. 90). There can be no doubt that in enjoining the consummation of the exchange offer the District Court was enforcing the Investment Company Act. And it is the Department of Justice's proper recognition of this fact which undoubtedly led to its unusual suggestion that the injunction below could be vacated without considering its propriety. We do not think the error below can be so readily overlooked.

The sweeping injunction below was not mere incidental relief ancillary to the Court's setting aside of the ICC orders. In defense of the District Court's injunction against the exchange offer, appellees (Appellees' Brief, pp. 106-112) make a variety of charges of improper conduct by Alleghany, and its management, (which have been denied) all irrelevant to the issues before this Court and calculated to be prejudicial. It would unduly prolong the length of this brief, without contributing to enlightenment on the real issues raised by this appeal, to deal with these various charges in detail. For the most part they appear to be a rather transparent effort to evoke some comment from this Court which the appellees may use in their pending derivative actions against the Alleghany management.

Particularly in view of the amount of space devoted by the appellees' brief to charges of unfairness and impropriety with respect to the preferred stock exchange offer, it is appropriate to repeat that there is no issue before this

Court as to the fairness of the exchange plan or the propriety of the conduct of the management. The issue here is whether the ICC had jurisdiction to issue the status and preferred stock orders challenged in the District Court. Appellees themselves concede (Appellees' Brief, p. 114) that the fairness of the exchange offer was not before the District Court, and of course it is not before this Court.

The SEC in its brief considers the question of the injunction from a different point of view. It argues that "the sale and delivery of the new stock are in violation of § 7 of the Investment Company Act" (SEC Brief, p. 22), and that § 47(b) of the Investment Company Act may make a contract relating to "the sale or disposition of securities" void (SEC Brief, pp. 17, 22). Appellees in their brief also point to § 47(b) to support an argument that Alleghany's new 6% preferred stock is void (Appellees' Brief, pp. 120-122).

These inter-related arguments are without merit. If it be assumed that the Investment Company Act does apply, neither § 47(b) nor any other liability-imposing section of the Investment Company Act would apply to Alleghany's heretofore completed issuance and delivery of the 6% preferred stock, for, as noted previously in this brief, under Point F., § 38(c) prohibits this result.

Furthermore, assuming that the word "contract" as used in § 47(b) encompasses a security, an assumption by no means clearly justified by the statutory language, § 47(b) uses the word "void" only in relation to certain individuals, i.e., those who violated the Act or those who acquired rights under the Act with knowledge of the violation, and does not say that every contract made in violation of the Act shall be void as against the world. Alleghany's innocent stockholders neither violated the Act nor acquired rights with knowledge of any violation, and the statute, by its terms, therefore cannot be applied to them. Even as re-

gards the two clearly defined classes of "guilty" persons to whom § 47(b) applies, the statute does not void the liability of such persons under contracts violative of the Investment Company Act, but merely prevents them from taking advantage of the fruits of violation in which they have engaged or acquiesced. All of this strongly suggests that the word "void" as used in § 47(b) must be interpreted as meaning "voidable". What is "void" is of no legal force whatsoever and such is not the thrust of § 47(b).

CONCLUSION

Alleghany, which controls New York Central, one of the largest railroad systems in the nation and which has been continuously regulated by the ICC since 1945, has now been told by the District Court that since some indefinable date in 1954 or 1955 it should have been regulated by the SEC under the Investment Company Act. It has been told this in the face of orders of both of these agencies that it was subject to the Interstate Commerce Act. The court's opinion, beyond its direct effect upon Alleghany, gives birth to a completely unworkable theory of regulation by administrative agencies, in that jurisdiction over a regulated company can now change from one agency to another on the basis of factual changes, leaving to the company not only the risk but the privilege of deciding by which agency, if any, it is subject to regulation without any determination of this question by the agencies involved.

A second result of the court's opinion, directly affecting not only the preferred but common stockholders of Alleghany, is that it prevents the consummation of an exchange offer of new preferred stock that had not only been approved by an overwhelming majority of all classes of stock but had been examined by the ICC and held to be fair and in the public interest. The court has deprived the preferred stock-

holders entitled to 400,000 shares not yet physically delivered of their capital and dividends and even the use of their money to meet obligations and expenses and has deprived the holders of the 900,000 shares already delivered of a market for their securities.

These disastrous consequences were not justified or required. Appellees, without any proper standing, have successfully inflicted this hardship upon their company and fellow stockholders through their desire to litigate private grievances. They can furnish no other justification for their continued frustration of the orders of the ICC, the regulatory body selected by Congress. This Court should now see that its orders are made effective.

The judgment of the District Court should be reversed in all respects and the injunction vacated.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 36

ALLEGHANY CORPORATION; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.; and ADELAIDE NEUWIRTH, on behalf of herself and all other common stockholders similarly situated,

Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR (PREFERRED STOCKHOLDERS) APPELLANTS GRUSS ET AL.

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Supreme Court of the United States

OCTOBER TERM, 1956

ALLEGHANY CORPORATION; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.; and ADELAIDE NEUWIRTH, on behalf of herself and all other common stockholders similarly situated,

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No. 36

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR (PREFERRED STOCKHOLDERS) APPELLANTS GRUSS ET AL.

The task of replying to appellees' brief is made difficult because it departs to such a degree from the record before the court below that, reading it, one would hardly believe that this case was decided on legal issues and argument alone, without the taking of any evidence respecting the correctness of the findings of the ICC, the fairness of the exchange offer herein, or the motivation of the parties who proposed it.

According to appellees the exchange plan was not designed to remove dividend arrearages on Alleghany's old preferred stock, thus to permit declaration of dividends upon the common, but was part of a giant conspiracy to enrich Messrs. Young and Kirby, officers of the company, at the expense of its common stockholders, with the ICC playing the role of "refuge" from SEC scrutiny. The preferred stockholders are called gamblers, who wagered for a "$15,000,000 premium above 100% of the legal maximum of the old preferred stock claim" (Br. p. 111) and who insist on "all or nothing" (Br. p. 19). For good measure, there is added the plain distortion that the SEC found the plan herein " 'grossly unfair' to the common stockholders" (Br. pp. 1, 5, 28, 112, 129).

We will demonstrate that nothing in the record before this Court supports these and other of appellees' similarly irresponsible statements upon which they rest their case, that the SEC did *not* find the plan to be "grossly unfair," and that the injunction cannot be justified *nunc pro tunc* by what the SEC did find. Nor can the injunction be supported on the theories that the preferred stockholders were not innocent purchasers, that hardship to them was self-inflicted, or that intervening equities in favor of recent purchasers of common stock are entitled to greater consideration than those of the holders of the "frozen" securities.

I

APPELLEES BECLOUD THE TRUE ISSUES BY MAKING CHARGES AGAINST ALLEGHANY'S OFFICERS AND BY CLAIMING IMPROPER MOTIVATION ON THE PART OF THE PROPONENTS OF THE EXCHANGE OFFER—NONE OF WHICH IS SUPPORTED BY ANY EVIDENCE IN THE RECORD.

No evidence was offered or received by the trial court with respect to the fairness of the plan or appellees' accusa-

tions against Messrs. Young, Kirby, et al. It decided this case on the pleadings, the record before the ICC and on the legal issues therein presented respecting ICC jurisdiction to enter the status and stock orders.*

Tucked away in a footnote to page 114 of their brief is an admission by appellees that

> "* * * the District Court did not pass on the fairness of the Plan and its conformity to statutory and other legal standards * * *."

Therefore, so much of appellees' brief as is devoted to these unsupported attacks upon the motives of Alleghany's officers, and as seeks to make it appear that the plan herein was fraudulently conceived, counts as nothing in the determination of the issues before this Court.

Everything that is said in appellees' brief respecting the alleged misconduct and illegal motivations of Messrs. Young, Kirby, et al. rests on nothing more substantial than the unsworn statements contained in a proxy statement of appellee Phillips. That diatribe was struck from the record by the ICC (R. 554).

This same material, which was annexed to paragraph 3 of the complaint as Exhibit A (R. 32, 39-53), was struck by the order of the District Court, dated December 23, 1955, signed by Judges Dimock and Walsh (R. 4).

The SEC in its opinion pays no attention to these personal attacks by Phillips, and its Division of Corporate Regulation reported:

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*The District Court could hardly base its decision on a disagreement with the conclusions arrived at by the ICC with respect to the fairness of the exchange offer. "So long as there is warrant in the record for the judgment of the expert body it must stand. * * *. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'" (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145-146 [1939]).

"E. Absence of Overreaching

* * *

"In light of all the testimony concerning the history of the plan, its consideration by independent advisors, the nature and reasons for the various changes in the plan, and the lack of any evidence which would impeach the motives or actions of Young and Kirby as officers of the corporation with respect to the plan, or in Young's case in making purchases of stock, we cannot find any equitable reason why either Young or Kirby should be denied participation in the plan as one of a class of stockholders. Nor can we find, as suggested by intervenors, that motives or actions of these persons have resulted in any unfairness in the plan" (Separate Appendix,* pp. 45; 46).

The decision below did not rest upon any of these baseless charges of overreaching now used by appellees to sustain the judgment appealed from. These charges should be ignored.

II

APPELLEES FAIL TO JUSTIFY THE INJUNCTION BY EVENTS SUBSEQUENT TO ITS ISSUANCE. THE SEC DID NOT HOLD THE PLAN "GROSSLY UNFAIR" AND ITS INTERPRETATION OF SECTION 18 OF THE INVESTMENT COMPANY ACT IS UNPRECEDENTED.

Appellees urge an affirmance of the injunction herein (a) on the basis of an alleged holding by the SEC that the plan is "'grossly unfair' to the common stockholders";

*Since the SEC opinion is annexed as an Appendix to its Brief *Amicus*, these appellants have prepared a separate appendix to this reply brief to supply the Court with the proposed findings and conclusions of the SEC's Division of Corporate Regulation.

(b) because the SEC has since held the plan to be in violation of the Investment Company Act; and (c) on the theory that the intervening rights of recent purchasers of common stock are entitled to greater consideration than those of the preferred stockholders, who are claimed not to be innocent purchasers because their stock has been frozen in the hands of original holders and because their hardship has been self-inflicted.

A. The SEC did not find the plan " 'grossly unfair' to the common stockholders."

Before giving consideration to the relevancy or persuasiveness of the SEC opinion, it is necessary to deal with appellees' distortion of the opinion, which is repeatedly described by appellees as finding the plan to be " 'grossly unfair' to the common stockholders" (Br. pp. 1, 5, 28, 112, 129).

The term "grossly unfair" was used only with respect to a result that would follow if, as conjectured by one of the witnesses, the common stock upon consummation of the plan would sell for $12.55, a price which it never reached. We quote from the SEC opinion:

> "* * * Lenz [one of the witnesses] expressed the view that Alleghany's common stock would continue to sell at a premium over its asset value, as it had at times in the past, so long as that asset value was increasing, and that Alleghany's common stock might be expected to increase to approximately the $12.55 figure after final consummation. On that basis the common stock into which each share of old preferred stock would be ultimately convertible would be in excess of $400, an amount which is considerably above the $270 figure that Lenz recognized as being high in terms of fairness to the existing common stockholders. In our opinion this would appear to produce a grossly unfair result" (Appendix, SEC Br. p. 57).

Therefore, appellees' repeated statement that the plan was held by the SEC to be " 'grossly unfair' to the common stockholders" is wholly unwarranted.

Actually, as the brief of the SEC itself demonstrates, the Commission found that the new preferred stock, because it contained a long-term right to subscribe to common stock, was not a senior security and, therefore, was outlawed by Section 18(d) of the Investment Company Act; and that, because the expert testimony on the value of the new preferred stock was conflicting, the SEC could not "find on the basis of the record that the exchange offer fell within the range of fairness" (SEC Br. pp. 11-12).

B. The SEC's decision on the application under Section 6(c) is not relevant; its interpretation of Section 18 of the Investment Company Act is unprecedented.

Were it not for the fact that the SEC has submitted a brief amicus and the United States has changed its position as a result of the SEC's ruling, we would answer the claim that the opinion of the SEC justifies the injunction herein by resting upon our legal position that what happened before the SEC is irrelevant on this appeal.

In view of the circumstances mentioned, we shall briefly analyze the majority opinion of the SEC in order to demonstrate that, apart from materiality and relevancy, its findings should not be preferred over those of the ICC, which, after due consideration, found the plan to be fair to all security holders and in the public interest.

Alleghany and some common and preferred stockholders—not including these appellants—following the entry of the judgment below, requested the SEC to declare that its approval of the new preferred stock issue was unnecessary, to find that it did not violate any provision of the Investment Company Act or, in the alternative, for an exemption pursuant to Section 6(c) of said Act.

The first of these requests was denied on the basis of the judgment of the court below.

The Commission then proceeded to hold that the new preferred stock fell within the prohibition of Section 18(d) of the Act and was not a "senior security" within the meaning of Sections 18(e)(2) and 18(g) of the Act.

Section 18(d) prohibits the issuance of "any warrant or right to subscribe to or purchase a security", unless such warrant or right to purchase expires not later than 120 days after its issuance.

Section 18(e), insofar as pertinent, provides:

> "The provisions of this section shall not apply to any senior securities issued or sold by any registered closed-end company * * * (2) for the purpose of refunding through payment, purchase, redemption, retirement, or exchange, any senior security of such registered investment company * * *."

A senior security is defined by Section 18(g) as follows:

> "(g) Unless otherwise provided: 'Senior security' means any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness, and any stock of a class having priority over any other class as to distribution of assets or payment of dividends * * *."

That Alleghany is a "closed-end company" and that the new preferred stock under the plan was to have priority over the old preferred, as well as the common stock, both as to "distribution of assets" and "payment of dividends" is undisputed.

The SEC itself states that the new preferred stock was to be "senior to the old preferred stock and common stock" (SEC Br. p. 34). The new preferred stock was, therefore, a "senior security" within the meaning of Section 18(e). That being so, the proscriptions of Section 18(d)

of the Investment Company Act did not apply and an exemption from that section was unnecessary.

The Commission reached the opposite conclusion without citation of any precedent,* holding that despite the definition of a "senior security" in Section 18(g), the new preferred stock cannot be considered a "senior security" because of its long-term convertibility. On this interpretation long-term convertibility is permissible in a senior security issued in exchange, but the senior security ceases to be one by virtue of any valuable long-term convertibility. We submit that this interpretation does violence to the plain meaning of the statute.

The SEC then considered exemption under Section 6(c). On this aspect the Commission refused to follow the recommendations of its Division of Corporate Regulation, which had declared:

> "Weighing the stockholders' claims for consideration and the unique posture of this particular case against the closeness of the question as to the applicability of Section 18(d) to the new preferred stock, we conclude that the policy of that section does not prevent us from granting an exemption from Section 7. We believe that this case is largely *sui generis* and that granting the exemption here will better serve the public interest and be consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act" (Separate Appendix, p. 23).

In its "Conclusion," the Commission stated as the basis of its refusal to approve—not that it found the plan "grossly unfair" to common stockholders, but—that it

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*The Division of Corporate Regulation stated:

> "There is little in the jurisprudence of the Investment Company Act to guide us in determining whether the Congress intended to include convertible preferred stock within the meaning of 'senior security' in Section 18(e)" (Separate Appendix, pp. 20-21).

> "found that the new preferred stock falls within the prohibition of Section 18(d) of the Act, and that on the basis of the record before us we cannot find that the exchange offer falls within the range of fairness. Under all the circumstances, we conclude that an exemption is not necessary or appropriate in the public interest or consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act" (SEC Br. p. 60).

In adverting to "the record before us," the Commission had reference to its earlier analysis of the testimony, which demonstrated that expert witnesses were at variance as to what might happen in the market-place (SEC Br. pp. 47, 52-60).

Strangely enough, in the Commission's view, any increase in the value of the common stock—which might thus reflect fairness of the plan to the common stockholders—might, *pro tanto,* move the plan outside the "range of fairness" because there would be a corresponding increase in the value of the preferred stock. It is true that if, as conjectured by the witness Lenz, the common stock price might reach $12.55, then the preferred stock would be worth over $400. On the other hand, as stated in the report of the Division of Corporate Regulation:

> "* * * If the common stock should drop to 5¾, for example, the net market value of the common stock for which the conversion rights would be exercisable would be only $94" (Separate Appendix, p. 22, footnote 1).

SEC dissenting opinion

In his dissenting opinion, Commissioner Patterson found the new preferred stock exempt pursuant to Section 18(e)(2), and disagreed with the majority's definition of a "senior security." Commissioner Patterson also held that,

although there are difficulties of evaluation, the exchange offer would in any event come within the permissible range of fairness, bearing in mind the purposes and the necessity for providing sufficient inducement to the preferred stockholders to accept new securities in exchange for the old preferred stock and its dividend arrearages. Commissioner Patterson, as did the ICC, also gave consideration to the fact that all of the stockholders, including the common stockholders, overwhelmingly approved the plan (SEC Br. pp. 61-64).

Since the ruling of the SEC respecting Section 18(e) is unprecedented and is as yet unreviewed in the Courts, and since its refusal to exempt the issue as being within the range of fairness was based on speculation as to what might happen in the market-place, this Court should not give greater consideration to the views of the SEC than to those of the ICC. The ICC after due consideration found—as did the SEC's Division and its dissenting Commissioner—that the plan was fair to all classes of stockholders, and consistent with the public interest (R. 535).

C. The equities do not favor common stockholders who purchased stock while this appeal was pending as against the preferred stockholders.

Throughout their brief appellees assert that the preferred stockholders are not "innocent purchasers" because, while common stockholders have bought millions of dollars worth of stock since the issuance of the injunction and in reliance thereon, the preferred stock has been frozen in the hands of original holders (Br. pp. 125-126).

With respect to the latter assertion we need only point to the facts that "[a]substantial number of shares of the new preferred stock were traded on the New York Stock

Exchange on June 24, prior to notice of the issuance of the restraining order herein," that approximately 100,000 shares were traded on a when-issued basis before and during the same period (R. 77), and that later, as a result of the partial stay granted by Mr. Justice Harlan and the District Court, some of the 900,000 distributed shares were undoubtedly transferred.

As for the common stockholders who bought their stock at depressed prices while this appeal has been pending, they would benefit from a reversal of the decision below. Indeed, counsel for appellees himself conceded that the common stockholders' "interests are hurt by the injunction" because the price of their securities would go down "if the preferred stock is restrained" (R. 59). Counsel has been borne out by the action of the market.

In further support of the claim that the preferred stockholders are not innocent, it is repeatedly asserted that they wagered on an "all or nothing" basis to obtain an illegal benefit under the plan to the extent of $15,000,000. (Br. pp. 17-19, 127). In arriving at this alleged "premium of at least 15 million dollars *over* 100% of their claim," appellees employ the highest market quotation for the preferred stock, resulting from an increase in price of the common to $10 per share on June 15, 1955 (Br. p. 33; SEC Br. p. 55). This method of determining fairness is as reliable as employing the closing market price for the common—6⅜—on January 18, 1957 which would give to the preferred a total conversion value of less than $17,000,000, or approximately $16,000,000 *less* than their legal claim of $33,000,000. The market price on any given day is hardly a reliable basis for determining the fairness of an exchange offer.

Appellees contend further that the preferred stockholders were not innocent because they had actual or constructive notice that these appellees (representing .0002 of the common) entertained objections to the stock offer as accepted by the overwhelming majority of all classes of

stockholders and as approved by the ICC. On this it seems sufficient to recall that Judge Dimock spoke of the preferred as "innocent stockholders" (R. 641) and that Mr. Justice Harlan (R. 647-648) recognized that the preferred stockholders were not at all responsible for the confusion resulting from the partial distribution of the new securities and the issuance of the injunction below. The SEC's Division of Corporate Regulation, in recommending that the plan be approved, stated:

> "we are motivated by the equities and plight of the security holders as was Mr Justice Harlan in staying the effectiveness of the injunction in part" (Separate Appendix, p. 56).

The hardship devolving upon the preferred stockholders was not self-inflicted.

Appellees claim (Br. pp. 123-124) that the preferred stockholders are responsible for inflicting upon themselves the hardship occasioned by the injunction. This is grounded upon the fact that counsel for these appellants stated—in answer to a question by the court as to how the problem of the partly-distributed stock could be solved—that he was unable in the circumstances to "conceive of anything that would work this out with the structure we are left with" (R. 86). To say that the hardship was self-inflicted because counsel was unable to suggest a solution to the problem which brings us to this Court, is indefensible.

III

THE ICC STOCK ORDERS DID NOT VIOLATE SECTION 15(2).

After successfully urging upon the District Court that Section 15(2) of the Interstate Commerce Act does not apply to the orders herein, but applies only to rate orders and the like, appellees now urge that the ICC stock orders violate that section because they provided that they were to take effect less than thirty days from the date of their issuance (Br. pp. 119-20).

The answer to this contention is three-fold.

First, there is a question whether a reasonable interpretation of Section 15(2) would require orders which are permissive rather than directory to comply with the 30-day waiting provision.

Second, it should be noted that Section 15(2) provides for the effective time of orders of the Commissions "[e]xcept as otherwise provided in this chapter" (Gruss main brief, p. ii). Paragraph (3) of Section 20(a) which governs the issuance of stock gives the Commission broad powers respecting the terms and conditions of its orders. Paragraph (3) grants the Commission the power to make orders governing the issuance of stock

> "upon such terms and conditions as the commission may deem necessary or appropriate * * *."

Third, paragraph (11) of Section 20(a) provides, in part, as follows:

> "* * * no security issued * * * in accordance with all the terms and conditions of such an order of authorization * * * shall be rendered void because

of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization."

If the Section 15(2) provision respecting the waiting period is to be read into and made part of Section 20(a)—despite paragraph 3 thereof—then the violation, if any, does not, under paragraph (11), render the security void by reason of failure to comply with such procedural provision.

CONCLUSION

By this time it should be clear that this attack on the jurisdiction of the ICC is motivated not by a desire to improve the position of Alleghany or to protect its stockholders but rather as a further means of airing appellees' private grievances presently *sub judice* in other—derivative stockholder—litigations. We believe that the trial court in reaching its conclusion overlooked the resulting grave consequences not only to the stockholders but also to the public. Whether or not Alleghany which controls one of the nation's greatest railway systems should be supervised by the ICC may be much more important than whether that agency or another should have passed upon the exchange offer.

Assuming, however, that ICC jurisdiction should have been terminated after its many years of regulation of Alleghany, its administrative orders issued in the interim should not have been affected. Also as a matter of equity the injunction below should not have been granted in view of the hardship it engendered as compared with the relatively insignificant harm its absence would have occasioned appellees, particularly since they can hardly be said to represent the common stockholders generally. These stockholders overwhelmingly voted for approval of the exchange offer.

The judgment of the District Court should be reversed and the injunction vacated.

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JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 36

ALLEGHANY CORPORATION; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.; and ADELAIDE NEUWIRTH, on behalf of herself and all other common stockholders similarly situated,

v. *Appellants,*

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO REPLY BRIEF FOR APPELLANTS JOSEPH S. GRUSS ET AL.

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FILED
JUN 19 1956
D M & F SECTION
Securities & Exchange Commission

UNITED STATES OF AMERICA

BEFORE THE

Securities and Exchange Commission

In the Matter of ALLEGHANY CORPORATION (File Nos. 812-987 812-988 812-998) (Investment Company Act of 1940).	PROPOSED FINDINGS AND CONCLUSIONS OF THE DIVISION OF CORPORATE REGULATION

NOTE: These proposed Findings and Conclusions have been prepared by the staff of the Division of Corporate Regulation and constitute solely the Division's opinion with respect to the matters herein contained; they do not contain, and should not be construed as in any manner containing, an expression of the views of the Commission on any question pertaining to these proceedings.

The Division of Corporate Regulation recommends that the Commission adopt the following findings and conclusions:

I. INTRODUCTION

This is a consolidated proceeding instituted by the separate applications of Alleghany Corporation, a registered investment company, certain holders of Alleghany's formerly outstanding 5½% Cumulative Preferred Stock, Series A, (old preferred stock) and certain holders of Alleghany's outstanding common stock and warrants for the purchase of common stock.

In brief resume, the instant applications are occasioned by a judicial determination that the issuance by Alleghany on June 23, 1955 of 6% Convertible Preferred stock (new

preferred stock) pursuant to an exchange offer for its old preferred stock was unlawful because Alleghany was not at that time registered as an investment company as required by the [2] Investment Company Act of 1940 ("Act"). In light of this determination injunctions were entered which led to suspension of trading in the new preferred stock on the New York Stock Exchange and over-the-counter market, and as a consequence stockholders who had received the new preferred stock prior to the entry of the injunction are prevented from freely transferring their stock, and others who had deposited their old preferred stock pursuant to the exchange offer are "frozen" in their holdings, delivery of the new preferred stock to them having been enjoined.

The applicants seek a declaration that no approval or other action of the Commission is now required under the Act with respect to the transactions involved in the exchange, or in the alternative, an order pursuant to Section 6(c) of the Act exempting said transactions, as of the time of their occurrence, from the provisions of the Act.

After appropriate notice public hearings were held with respect to the several applications which had been consolidated for such purpose and for disposition. Randolph Phillips, Breswick & Co. and Dr. Clarence W. Bailey (hereinafter collectively referred to as "intervenors"), who are holders of Alleghany's common stock, were admitted as parties intervenors in the proceedings and for reasons discussed herein have opposed the granting of the requested relief. After the record was closed, the various parties filed proposed findings and supporting briefs.

[2A]

II. BACKGROUND

A. Jurisdiction of Interstate Commerce Commission over Alleghany:

Alleghany was not registered as an investment company when it attempted to consummate the transactions for which an order of this Commission is now sought. It

had previously been registered under the Act, having filed a Notification of Registration on November 1, 1940, the effective date of the Act, as a closed-end, non-diversified management investment company. On June 5, 1945 Alleghany owned approximately 600,000 shares of the common stock of the Chesapeake & Ohio Railway Company ("C & O") and through such stock ownership controlled the C & O. On this latter date the Interstate Commerce Commission ("ICC") approved Alleghany's control of the C & O and its system companies and ordered, among other things, that Alleghany be considered a carrier subject to certain provisions of the Interstate Commerce Act. On the basis of this order and an examination of the provisions of the Interstate Commerce Act which were declared to be applicable to Alleghany, this Commission on October 4, 1945, found that Alleghany was "subject to regulation under the Interstate Commerce Act," and was therefore, by virtue of Section 3(c)(9) of the Investment Company Act,[1] excepted from the definition of an investment company. The Commission ordered, pursuant to Section 8(f) of the Act that Alleghany's registration [3] as an investment company should cease to be in effect.[2]

From time to time after 1945 Alleghany disposed of part of its holdings of the C & O stock, culminating in the sale on January 19, 1954 of the residual block of 104,854 shares. About the same time it also took other steps to terminate its control over the C & O (PS 12A-H).[3] On June 22, 1954, the ICC issued an order directed to Alleghany to show cause why it should no longer be deemed

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[1] Section 3(c)(9) excepts from the definition of an investment company "Any company subject to regulation under the Interstate Commerce Act . . ."

[2] 20 SEC 731 (1945).

[3] Exhibit references are abbreviated herein as follows: "PS" refers to Preferred Stock Applicants' Exhibits; "CS" refers to Common Stock and Warrant Holders' Exhibits; "SEC" refers to Exhibits introduced by this Commission's Staff; and "I" refers to Intervenors' Exhibits. References to the official transcript of the hearing are prefixed with the abbreviation "R".

a carrier and the ICC's 1945 order so declaring should not be revoked. (Finance Docket No. 14692) In response thereto Alleghany requested the ICC to withhold action on its status as a carrier until it initiated new proceedings raising the same issue. Alleghany did initiate proceedings to such end (Finance Docket No. 18656) which were combined with the ICC's own proceedings. Such proceedings were predicated upon an asserted change in the form of control of a carrier indirectly controlled by the New York Central Railroad Company ("Central"), which company in turn Alleghany asserted it controlled, by reason of its participation in 1954 in a successful proxy contest to change Central's management and its subsequent acquisition of substantial holdings of Central's common stock. By orders dated March 2, 1955 and May 24, 1955 ("status order") the ICC terminated its 1945 order but also declared Alleghany to be deemed a carrier subject to certain provisions of the Interstate Commerce Act including those regarding the issuance of securities by Alleghany (PS 28, 29). [3A] Before describing the action taken by the ICC with respect to the exchange offer, we shall set forth the nature of Alleghany's security structure at the end of 1954 and the terms of the exchange offer.

[4]

B. Alleghany's Outstanding Securities as of December 31, 1954

As of December 31, 1954, Alleghany had outstanding the following securities (PS 121):

(1) $7,496,000 of 5% sinking fund debentures due 1962 and $14,000,000 of notes payable to banks.

(2) 25,637 shares of $4 prior preferred convertible stock ("$4 preferred stock"), entitled on redemption or voluntary or involuntary liquidation to $80 per share, or an aggregate of $2,050,960, plus any accrued dividends. There were no arrears in the cumulative dividends payable on this stock at the rate of $4 per share per annum. Each

share was and is convertible into sixteen shares of common stock, and the holders of the stock, voting as a class, are entitled to elect two directors.

(3) 136,744 shares of old preferred stock, $100 par value, entitled on redemption or voluntary liquidation to $105 per share, or in involuntary liquidation to $100 per share, plus in each instance accrued dividends. Unpaid dividend accumulations at the rate of 5½% per annum amounted to $130.17 per share. The aggregate preference of the outstanding shares of this stock over the common stock in voluntary dissolution was $14,358,120 and in involuntary dissolution $13,674,400, plus dividend arrears of $17,799,511. The holders of the stock, voting as a class, were entitled to elect two directors, such right inuring because of the existence of certain specified dividend arrears.

(4) 4,641,125 shares of common stock, par value $1 per share, having a net asset value, on the basis of indicated market quotations for Alleghany's investments, of $7.21 per share, or an aggregate of [5] $33,495,974. The holders of the common stock, voting as a class, are entitled to elect four directors.

(5) 2,000,000 warrants for the purchase of 2,000,000 shares of common stock at a price of $3.75 per share ("perpetual warrants"), such warrants having no time limitation upon their exercise.

C. The Exchange Offer

Alleghany's old preferred stock had been outstanding for many years and the last dividends thereon had been paid on May 31, 1931. In 1946 Alleghany commenced a program of reacquiring the old preferred stock. Through repurchases and various exchange offers, all at a discount from the redemption value or liquidating claim of the preferred stock, the amount thereof outstanding in the hands of the public had been reduced from 667,539 shares at the

beginning of 1946 to approximately 148,000 shares at the end of 1952 when the last exchange offer was consummated. During 1953, Alleghany repurchased approximately 11,000 additional shares but made no further reacquisitions through the end of 1954 when consideration was initially given to the present exchange plan (RS 1, 2, 12A-I).

A witness for Alleghany testified that repurchasing on the market at a discount was stopped because of stockholder litigation which developed. Holders of the old preferred stock and also of the prior preferred stock filed complaints alleging that these repurchases were unfair to their respective interests.

On January 14, 1955, Alleghany called a special meeting of its stockholders in order to implement the recommendation of the Board of Directors that another exchange offer be made to the holders of the old preferred stock. This recommendation was made as a means of further reducing the dividend arrears on the old preferred stock which constituted a legal [6] barrier to dividends on the common stock. At the special meeting held on February 8, 1955, Alleghany's stockholders, voting by classes, authorized the creation of 1,367,400 shares of new preferred stock and an increase in the number of authorized shares of common stock so as to provide the additional shares which would be required upon conversion of all of the new preferred stock into common stock. (PS 3, 4)

The vote on the charter amendments involved is indicated by the following table, which gives the results of the vote on "Proposal I", relating to the preferential and conversion rights of the new preferred stock:

	Outstanding Shares Entitled to Vote	No. of Shares Represented at Meeting	No. of Shares Voting		
			In Favor	Against	Not Voting
4% Prior Preferred Convertible Stock	25,845	22,386	22,310	75	1
Old Preferred Stock	136,744	93,163	87,097	5,801	265
Common Stock	4,641,585	3,453,973	3,269,217	77,623	107,133

In essence, through the exchange offer Alleghany hoped to persuade the holders of the old preferred stock to exchange their shares, with a voluntary liquidation preference and redemption price of $237 per share as of May 1, 1955 ($105 plus $132 of unpaid dividend arrears), for shares of new preferred stock, having a voluntary liquidation preference and redemption price of only $105, but which also carried conversion rights to purchase shares of Alleghany common stock which rights would give the new preferred stock a market value of $237, plus a premium reflecting the fact that the new preferred stock was noncallable for fifteen years.

The exchange offer was mailed on February 10, 1955. (PS 5) Holders of the old preferred stock were invited voluntarily to exchange each share of old preferred stock ($100 par value) for ten shares of new preferred stock ($10 par value), a newly created issue junior to the $4 preferred [6A] stock but senior to the old preferred stock and common stock. The new preferred stock had the following rights:

(a) It was entitled to cumulative dividends at the rate of 6% per annum from May 1, 1955.

(b) It was entitled to 105% of par value in the event of voluntary liquidation and to par value in the event of involuntary liquidation.

(c) It could not be called for redemption until May 1, 1970, and thereafter could be redeemed at any time at 105% of par value.

[7] (d) It was convertible into common stock upon payment of $3.75 per share of common stock. The number of shares of common stock into which the new preferred stock was to be convertible was to be fixed on the last day on which the exchange offer could be accepted ("closing date"), so that as of that date the market price of such common stock would be equal to approximately $237 after allowance for the cash payment of $3.75 per share of com-

mon stock which such stockholder would have to pay upon conversion. This result was to be assured by operation of a formula which provided that the conversion ratio would be set by dividing (1) 23.7 (being 1/10 of the May 1, 1955 redemption price of $237 of the old preferred stock) by (2) the difference between $3.75 and an amount equal to the closing price of Alleghany's common stock on the New York Stock Exchange on the closing date. The result of this computation was to be computed to the nearest one-tenth of a share. In no event, however, was the new preferred stock to be convertible into more than 10.8 shares of common stock.

(e) Holders of the stock, voting as a class, were entitled to elect two directors.

The exchange offer was to be open until 3:30 P.M. on the closing date, which was defined to mean the fifth day after the ICC issued an order, not later than May 31, 1955, substantially in the form requested, approving the issuance of the new preferred stock and the issuance and sale of additional shares of common stock upon conversion of the new preferred stock. Any holder of the old preferred stock could accept the offer by depositing for exchange all or any number of such shares held by him and had the right to withdraw the shares so deposited at [8] any time prior to the closing date.

The exchange offer was subject to two conditions: (1) issuance of an appropriate order by the ICC on or before May 31, 1955 approving the securities to be issued or issuable under the offer, and (2) acceptance of the offer by holders of 100,000 shares of the old preferred stock, or such lesser number as Alleghany might elect to accept. Alleghany reserved the right, at its election, to extend the exchange offer.

D. ICC Approval of Exchange Offer

The ICC, by order of Division 4 on May 26, 1955 authorized the issuance of securities pursuant to the preferred

stock exchange plan (PS 30). The ICC conditioned its order, however, to require that the determinative common stock market price establishing the conversion ratio be that of the last sale on May 25, 1955, the day preceding the issuance of the ICC order, rather than on the "closing date" specified in the plan. This action was taken "in order to eliminate the possibility of manipulation of the common stock prices, with the object of influencing the conversion rights of the 6 percent preferred stock, and to make it possible for holders of the series A preferred stock to determine prior to the closing date of the exchange offer what the conversion ratio will be (PS 31). This condition was accepted by the Executive Committee of Alleghany's Board of Directors, which concluded that the change was not material, and the plan was appropriately modified (PS 7). The last sale price of Alleghany common stock on May 25, 1955 was $8.75 and under the conversion formula each share of new preferred stock became convertible into 4.7 shares of common stock.

[9] On May 27, 1955, Alleghany notified the holders of old preferred stock that the plan had been changed pursuant to the ICC's order to fix the conversion ratio for the new preferred stock at 4.7 on the basis of the May 25 closing price, and that the last date for revoking a previously made acceptance of the exchange offer or for depositing additional shares under the exchange offer was June 6, 1955 (PS 8). 132,344, or 96.8%, of the 136,744 shares of old preferred stock that were outstanding accepted the exchange offer (SEC 9).

E. Subsequent Litigation

On June 2, 1955, Breswick & Co. and Phillips asked the ICC to reconsider the order of Division 4 approving the Exchange Offer. By order dated June 22, 1955, the ICC denied the petition for reconsideration (PS 32). Alleghany was informed of this order on June 23, 1955 (R. 825-6) and thereupon instructed J. P. Morgan & Co., its Transfer

Agent, and the Marine Midland Trust Company of New York, its Exchange Agent to proceed with the distribution of the shares of new preferred stock issuable under the Exchange Offer (R. 866). 876,800 shares of new preferred stock (the equivalent of 87,680 shares of old preferred stock) were so distributed on June 23, 1955, primarily through the mails (R. 821). 446,640 shares (the equivalent of 44,664 shares of old preferred stock) were being held for manual delivery against so called "window tickets", when Alleghany was notified in the early evening of June 23, 1955, that a special three-judge court of the United States District Court for the Southern District of New York in an action brought by Breswick and Phillips had entered a temporary restraining [10] order with respect to the exchange offer.[1] This order had the effect of preventing the further transfer of the 876,800 shares of new preferred stock already delivered and the distribution of the undistributed 446,640 shares of such stock, and the transfer and exchange agents were so notified (R. 828; I 13-14). The following day the New York Stock Exchange suspended trading in the new preferred stock and postponed settlement of such stock as had been traded either on a "regular way" or on a "when issued" basis. Similar action was in effect subsequently taken in the over-the-counter market (R. 832; PS 17B).

On July 26, 1955 the special three-judge court entered a preliminary injunction which in effect contained the restraining order (PS 37). On August 9, 1955, by order of Mr. Justice Harlan of the United States Supreme Court, the preliminary injunction was stayed as to the new preferred stock which had been delivered (PS 39). However, despite the stay order, transfer of these shares continues to be severely limited since the suspension of trading in these shares is still in effect. As so stayed the preliminary injunction was made final on December 23, 1955, the court ordering that the status and preferred stock orders of the

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[1] *Breswick & Co., et ano* v. *U. S., et al.*, Civil Action No. 101-114.

ICC be "enjoined, set aside, annulled and voided" or "suspended" (PC 39).[1]

[11] In its opinion dated November 18, 1955 (138 F. Supp. 123), in connection with its final injunction, the court held, for reasons therein indicated, that Alleghany at the time it issued the new preferred stock was not subject to regulation by the ICC under the Interstate Commerce Act but was subject to the provisions of the Investment Company Act and that the new preferred stock could not lawfully be issued because of Section 7 of the Act.[2]

On December 9, 1956 Alleghany filed with this Commission a Notification of Registration as a close-end, non-diversified management investment company pursuant to Section 8(a) of the Act. On January 10, 1956 certain persons who had deposited their old preferred stock for exchange and who either had received the new preferred stock or held window tickets therefor filed their application herein. On January 18, 1956 and February 24, 1956, respectively, certain holders of Alleghany's common stock and warrants to subscribe for common stock, and Alleghany itself, filed their separate applications herein.

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[1] Appeals from the December 23, 1955 order of the three-judge court have been taken to the Supreme Court of the United States. Argument will be heard at the next term of the Court which begins in the fall of 1956.

[2] Section 7 of the Act provides in pertinent part as follows: "Section 7(a) No investment company . . . unless registered under Section 8, shall directly or indirectly—

"(1) offer for sale, sell or deliver after sale, by the use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security . . ."

"(2) purchase, redeem, retire or otherwise acquire or attempt to acquire, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security . . ."

[11A]

III. THE STATUTORY ISSUES INVOLVED

A. The Request for a Commission Determination of Non-action.

Initially the applicants seek a determination that no approval or other action of the Commission is now required under the Act with respect to the transactions involved in the preferred stock exchange. This request is predicated in part upon Allgehany's contention that our order of October 4, 1945 had the continuing effect of granting Alleghany an exemption from the Act when it issued its new preferred stock on June 23, 1955.

Our 1945 order which was entered under Section 8(f)[1] of the Act provided in relevant part as follows:

> "IT IS HEREBY DECLARED that Alleghany Corporation has ceased to be and is not now an investment company within the meaning of the Investment Company Act of 1940; and
>
> "IT IS ORDERED that the registration of Alleghany Corporation under the Investment Company Act of 1940 shall forthwith cease to be in effect, provided, however, that if in the future Alleghany Corporation ceases to be subject to regulation under the Interstate Commerce Act . . . this order may be revoked, suspended or modified after appropriate notice and opportunity for hearing."

Applicant's contention with respect to the effect of our 1945 order was considered at length and rejected by the special three-judge court in the Breswick case.

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[1] Section 8(f) provides: "Whenever the Commission, on its own motion or upon application, finds that a registered investment company has ceased to be an investment company, it shall so declare by order and upon the taking effect of such order the registration of such company shall cease to be in effect. If necessary for the protection of investors, an order under this subsection may be made upon appropriate conditions. The Commission's denial of any application under this subsection shall be by order."

[12] ". . . as Alleghany was not wthin ICC regulation when it proposed to issue its new preferred stock, the issuance of that stock would violate the Investment Company Act for this reason: The SEC order of October 25, 1945, which terminated Alleghany's registration under the Investment Company Act, ceased to have any effect, at the very latest, on May 24, 1955, and Alleghany was then forthwith within the coverage of the Investment Company Act. Alleghany could not thereafter lawfully issue any new securities because of Section 7 of that Act, . . .

"Alleghany contends, however, that the SEC order of October 25, 1945, exempted Alleghany from the Investment Company Act; that, to bring Alleghany within the coverage of the Act required another SEC order; and that no such order has been entered. We cannot agree for this reason: Section 3(c)(9) of that Act, . . . , exempts from that Act's provisions any company subject to ICC regulation. The SEC order of October 25, 1945 was but a formal recognition of that exemption, which became operative when the ICC made its order of June 5, 1945, since, by that order, Alleghany became subject to ICC regulation. When, however, at the latest on May 24, 1955, the June 5, 1945 ICC order lost its efficacy, thereupon the SEC order of October 24, 1945 became automatically inefficacious, with the result that Alleghany immediately became again subject to the Investment Company Act."

To escape the impact of the court's determination of this question Alleghany argues that the above is a maatter of dicta and not the law of the case. We note that both Alleghany and the ICC have both specified the question of the jurisdiction of the court to enjoin a violation of Section 7 for determination by the United States Supreme Court in their pending appeals from the order of the three-judge court. Until and unless the Supreme Court reverses the action of the three-judge court we shall abide by its holdings.

B. The Applicability of Section 6(c)

Before we turn to the question of the standards of Section 6(c) which must be satisfied before we may enter an exemptive order thereunder, [13] we are met at the outset with the question of whether our powers under this Section of the Act may be exercised to exempt a transaction theretofore consummated in violation of Section 7.

Section 6(c) of the Act provides that:

> (c) "The Commission, by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title."

That we have power to exempt from the provisions of Section 7 is clear for Section 6(c) provides that we may exempt "from any provision" of the Act and Section 6(e) specifically contemplates an exemption from Section 7.[1] While not specifically so provided in the Act we have consistently held that our exemptive powers under Section 6(c) may be exercised with respect to a transaction which has been previously consummated.

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[1] Section 6(e) provides:

> "If, in connection with any rule, regulation, or order under this section exempting any investment company from any provision of Section 7, the Commission deems it necessary or appropriate in the public interest or for the protection of investors that certain specified provisions of this title pertaining to registered investment companies shall be applicable in respect of such company, the provisions so specified shall apply to such company, and to other persons in their transactions and relations with such company, as though such company were a registered investment company."

[14] In *Hugh B. Baker,* 24 S. E. C. 202 (1946) we held that we had no jurisdiction under Section 17(b) to exempt a previously consummated transaction between affiliated persons since that section, by its terms, is applicable only to a "proposed" transaction; however, we granted the requested exemption under Section 6(c) stating, (at 205):

> "Section 6(c) permits us to exempt "any transaction" from "any provision" of the Act "if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title. Section 6(c) was inserted in the Act to take care of the exceptional situations and transactions which, while they might not be permitted under the specific statutory terms of other provisions, might still be regarded as "consistent with the protection of investors and the purposes fairly intended by the policy and provisions" of the Act. *Cf. Atlantic Coast Line Company,* 11 S. E. C. 661, 667 (1942); *International Mining Company,* 12 S. E. C. 174 (1942).
>
> "There is in Section 6(c) no requirement that we confine our exemptive power under that Section to transactions which are proposed to take place in the future. The fact that a transaction has already been consummated in good faith is no bar, therefore, to the exercise of our exemptive power under Section 6(c), if the exemption would otherwise be in the public interest and consistent with the protection of investors and with the policy and provisions of the Act."

For other cases in which we have granted exemption under Section 6(c) in respect of consummated transactions see: *Graham-Newman Corporation,* 28 S. E. C. 133, (1948); *Consolidated Corporation,* Investment Company Act Release No. 1413 (1950); *The Pennroad Corporation,* Investment Company Act Release No. 1636 (1951); *American Research & Development Corporation,* Investment Company Act Release No. 2254 (1955).

[15]

C. The Standards to be Applied Pursuant to Section 6(c)

Turning now to the standards of Section 6(c), we may issue an exemptive order thereunder only if we find that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. We have held that this broad power must not be so freely applied that the basic objectives of the Act are thwarted.[1] As we indicated in *American Participation, Inc.*, the propriety of granting the relief which is sought largely depends upon the purposes of the section from which an exemption is requested, the evils against which it is directed, and the end which it seeks to accomplish.[2]

As stated the exemption here sought is from Section 7 of the Act which generally prohibits an unregistered investment company from engaging in transactions in interstate commerce or utilizing the mails. The evident purpose of Section 7 is to compel registration of investment companies so that the regulatory provisions of the Act might be applicable to them. This purpose has been achieved by Alleghany's registration on December 9, 1955, but this does not obviate the necessity of testing the transactions for which exemption is sought against the policy and provisions which would otherwise have been applicable had Alleghany been registered at the time of the occurrence of these transactions. The [16] statutory provisions which would or may have been applicable had Alleghany been registered at the time it proposed its exchange offer include Section 25(b) and (c) and 18(d) and (e), and we turn to a discussion of the applicability of these sections to the transactions involved in the exchange offer.

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[1] *Petroleum and Trading Corporation*, 11 S. E. C. 389 (1942).

[2] 10 S. E. C. 431, (1941). That this is our well settled administrative construction of Section 6(c) is evident from *Transit Investment Corporation*, 28 S. E. C. 10 (1948) and the cases therein collected.

D. The Applicability of Sections 25(b) and (c)

As previously stated, on January 14, 1955 Alleghany mailed to its stockholders a notice of a special meeting to be held on February 8, 1955 for the primary purpose of creating the new preferred stock and authorizing the additional shares of common stock which would be required in the event of conversion of the new preferred stock. A proxy statement explaining the then proposed exchange plan was included in the mailing. Since by definition of Section 2(a)(32) of the Act the then proposed exchange plan constituted a "reorganization",[1] there appears no question but that there was a "solicitation of security holders with respect to any plan of reorganization" within the meaning of Section 25(b) of the Act.

Section 25(b) of the Act provides in relevant part:

> "The Commission is authorized, if so requested, prior to any solicitation of security holders with respect to any plan of reorganization, by any registered investment company which is, or any of the securities of which are, the subject of or is a participant in any such plan, or if so requested by the holders of 25 per centum of any class of its [17] securities, to render an advisory report in respect of the fairness of any such plan and its effect upon any class or classes of security holders."

In addition, had Alleghany been registered the proposed reorganization plan would have required consideration of possible action by the Commission pursuant to the provisions of Section 25(c) of the Act. That Section provides in relevant part:

> Section 25(c): "Any district court of the United States is authorized to enjoin the consummation of any plan of reorganization of such registered investment com-

[1] Section 2(a)(32) provides: "Reorganization means . . . (D) a restatement of the capital of a company, or an exchange of securities issued by a company for any of its own outstanding securities".

pany upon proceedings instituted by the Commission (which is authorized so to proceed upon behalf of security holders of such registered company, or any class thereof), if such court shall determine any such plan to be grossly unfair . . ."

Sections 25(b) and (c) taken together are but part of the statutory scheme to mitigate the evils recited in Section 1(b)(1) that arise when "investors . . . exchange . . . vote, refrain from voting, sell or surrender securities issued by investment companies without adequate, accurate and explicit information, fairly presented . . ." and in Section 1(b)(2) when investment companies are managed "in the interests of directors, officers" or "special classes of their security holders", and in Section 1(b)(3) when investment companies issue securities "containing inequitable or discriminatory provisions, or fail to protect the preferences and privileges of their outstanding securities."

We recognize that neither Section 25(b) or (c) would *ipso facto* have prevented the proposed exchange. This result could have obtained under Section 25(b) only if it be assumed that we had been requested to [18] render an advisory report, that pursuant thereto we found the plan unfair, and for such reason the stockholders either failed to authorize the stocks in question or did not participate in the exchange. This result under Section 25(c) would have depended upon *our ability* to convince a district court that the plan was "grossly unfair".

Applicants appear to contend, that because of the foregoing considerations and the fact that we do not have the power under either of these subsections to approve or disapprove the plan, it is not now necessary for us to consider the plan under either the standard of "fairness" or "gross unfairness", expressed in Sections 25(b) and (c) respectively. We reject this contention. It is our view that since we may invoke our extraordinary exemptive powers under Section 6(c) only upon a finding, among other things, that a transaction is in the "interests of investors", we could

not consistently so find were we at the same time not convinced of its "fairness" within the meaning of Section 25(b). Only thus may we now afford to the investors protection equal in scope to, although not necessarily the same as, that contemplated by Section 25(b) [19] which was denied them by Alleghany's failure to register.[1] Accordingly, in a later section of this Opinion, we shall consider the fairness of the exchange offer.

[20]

E. Applicability of Sections 18(d) and 18(e)

Among the issues for determination is whether the new preferred stock, by virute of its conversion rights, comes within the prohibition of Section 18(d). Section 18(d) provides in part:

> "It shall be unlawful for any registered management company to issue any warrant or right to subscribe to or purchase a security of which such company is the issuer, except in the form of warrants or rights to sub-

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[1] For a discussion of the protective purposes of Section 25(b) see Hearings Before Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 10065, Seventy Sixth Congress, Third Session at page 126. Commissioner Healy there testified:

> ". . . here you have got a field where the stockholders and the security holders are completely unprotected. It is a voluntary reorganization out of court . . . We know from experience that the security holders are told conflicting stories . . . They do not know whom to believe. It is beneficial if a Government body with no money stake in the enterprise, which does not care a hoot about either side, to render a report. We do not in the reports say to the people, "you ought to take this" or "You should not take it." But, we do give them an impartial analysis which is gotten up by men who know something about the subject on which they can really depend."
>
> ". . . If a plan has been proposed that just simply ignores the rights of the security holders, I think that the Securities and Exchange Commission ought to be able to say in a report, 'This plan means so and so. In certain respects it seems to violate your legal rights. If you want to take it, that is all right with us. But here is what we think your rights are in that situation'."

scribe expiring not later than one hundred and twenty days after their issuance . . ."

Section 18(e), however, exempts from this prohibition a senior security issued by a closed-end company as part of a reorganization. The pertinent provision reads:

"The provisions of this section 18 shall not apply to any senior securities issued or sold by any registered closed-end company—

• • • • •

(2) for the purpose of refunding through payment, purchase, redemption, retirement, or exchange, any senior security of such registered investment company . . ."

"Senior security" is defined in Section 18(g):

"Unless otherwise provided: 'Senior security' means . . . any stock of a class having priority over any other class as to distribution of assets or payment of dividends . . ."

Intervenors argue that convertible securities contain in substance a warrant or right to purchase which is within the Congressional policy expressed in Section 18(d). If the registrant sought to issue in exchange for the old preferred stock non-convertible preferred stock plus a 15-year warrant to purchase common stock, unquestionably the warrants would be prohibited by Section 18(d). Intervenors contend that the difference between preferred stock and warrants, issued separately, and preferred stock with a right to purchase by converting, issued as a single security, is one [21] of form only; hence, we are urged to look through the form to the substance and hold the new preferred stock in this instance to be prohibited by Section 18(d).

There is little in the jurisprudence of the Investment Company Act to guide us in determining whether the Congress intended to include convertible preferred stock

within the meaning of "senior security" in Section 18(e). Assuming as a general proposition that it did, there are further questions whether the conversion right of a convertible preferred stock is severable to be within the ban of Section 18(d) even though the other characteristics of security are entitled to the exemption of Section 18(e); and, whether, even if the conversion right is not severable, the value and purpose of the conversion right may so dominate the investment characteristics of the nominal convertible preferred stock as to make it in substance not a senior security but merely a warrant or right to purchase.

As will be seen from our subsequent discussion herein, there is much to support the view that the registrant's new preferred stock is predominantly a right to purchase. Certainly this is true in terms of its market value; indeed, the exchange formula by which its conversion rights were determined was deliberately calculated to produce a market value far in excess of the par value of the preferred stock. Alternatively it may be considered that the plan proposes to substitute the new preferred stock for the old preferred stock to the extent of its liquidation claim without arrears, and to compensate for the arrears by the conversion rights.

The only evidence in the record to show what market value would attach to this new preferred absent the conversion right is expert testimony offered by applicants indicating that the market value of the new preferred stock [22] without the conversion right would have been at some or perhaps a substantial discount from par. (R. 588, 611, 969.) Certainly its value absent the conversion right would not be in excess of par. But the record shows that the new preferred stock exchanged for each share of old preferred stock was expected to sell for about $20 in excess of $237 (the redemption value of the old preferred stock). (R. 647, CS. 3(a).) On June 16, 1955, the new preferred stock was quoted at a high of 35⅛ or $351.25 for 10 shares. (I. 1.) On the basis of the price on May 25, 1955 (the date as of which the conversion ratio was fixed) of roughly $260 per 10 shares of new preferred stock exchangeable for one share of old preferred stock,

at least $160, or 62% of the total, was undoubtedly represented by the 15-year non-callable conversion right.

Certainly in the present state of the market the new preferred stock was expected to, and would, sell in terms of the market value of the common stock into which it could be converted plus a premium for the 15-year non-callable provision. On the other hand if the value of the conversion right dropped because of a decline in the value of Alleghany's common stock, the value of the preferred stock attributes might become dominant.[1] In a decline in the market, or in liquidation, the holders of the new preferred stock would be substantially better off than would be the holders of mere warrants, or rights to purchase.

[23] The case is obviously a close one. The preferred stock attributes of this security are clearly subordinate and probably have an indiscernible influence on its market value under present conditions. Yet the preferential right to assets and dividends is more than merely nominal and could, under different conditions in the future, be of substantial value. If we place the emphasis, however, on the determinative attributes at the time of issuance to achieve the desired effect of inducing exchange and eliminating preferred dividend arrearages, then it appears that the preferred stock aspects are virtually insignificant.

We do not believe it necessary, however, to resolve these issues in this case. The central question with which we are confronted is whether the policies of the Act will be better served by granting an exemption from Section 7 and, in effect, making lawful transactions, including the issuance of the new preferred stock, which occurred during

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[1] The common stock had a market value on May 25, 1955, of 8¼. Based upon this, the conversion right to 47 shares of common stock for 10 shares of new preferred stock plus $3.75 cash per share of common stock would entitle the new preferred stockholder to a net of $237 in market value of common stock. If the common stock should drop to 5¼, for example, the net market value of the common stock for which the conversion rights would be exercisable would be only $94.

the period when the court has held that Alleghany should have been registered under the Act but was not.

In the present case there are compelling considerations of countervailing equities and unusual circumstances which in our opinion should [24] prevail over the possibility that the new preferred stock may be contrary to the particular policy of Section 18(d).[1] Whatever may be said of the reasonableness and good faith of Alleghany's management, many hundreds of individual stockholders have been caught in a trap not of their own making. Our exemptive order will not in itself relieve these victims, but it may open the door to the only speedy relief foreseeable.

Weighing the stockholders' claims for consideration and the unique posture of this particular case against the closeness of the question as to the applicability of Section 18(d) to the new preferred stock, we conclude that the policy of that section does not prevent us from granting an exemption from Section 7. We believe that this case is largely *sui generis* and that granting the exemption here will better serve the public interest and be consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

[25]

F. Applicability of the Securities Act of 1933

In our Notice and Order for Hearing we also raised for determination the question of what conditions it might be necessary to attach to any order exempting the exchange

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[1] We are mindful of the fact that the Commission's authority over this issue, had it arisen with regard to a registered investment company, would have been in terms of our power to seek an injunction pursuant to Section 42(e). This section states in part:

> "Whenever it shall appear to the Commission that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this title . . . it may in its discretion bring an action in the proper district court of the United States . . ."

Furthemore our exemptive power under Section 6(c) extends to Section 18(d) in an appropriate case.

plan from the provisions of the Act. Specifically we posed the question whether Alleghany "shall offer the old preferred stockholders reasonable opportunity to confirm or withdraw their acceptance of the exchange offer or shall afford such stockholders or their successors in title other proper alternatives."

We raised the foregoing issue since Alleghany's new preferred stock was not registered under the provisions of the Securities Act of 1933 nor a prospectus delivered in connection with its offer and sale. Alleghany had claimed the benefit of an exemption from the provisions of that Act pursuant to Section 3(a)(6) thereof exempting securities "issued by a common or contract carrier, the issuance of which is subject to the provisions of Section 20a of the Interstate Commerce Act, as amended." As indicated earlier it has been judicially determined that Alleghany was not subject to the provisions of Section 20a at the time of the offering and sale of the new preferred stock.

Section 24 of the Investment Company Act specifically contemplates compliance by investment companies with the provisions of the Securities Act of 1933 and the policy of "full and fair disclosure" pervades both acts.

[26] Absent a statutory exemption, compliance with the Securities Act of 1933 is mandatory. The statute does not vest in us exemptive powers nor power to condone its violation. To ensure fulfillment of its purposes it provides among other things for private rights to damages for non-compliance. In light of these considerations we believe that we cannot grant the requested exemption under Section 6(c) as "consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act" unless we can afford stockholders a protection comparable to that afforded were there statutory compliance in the first instance. We will condition our order herein to require that appropriate steps be taken to this end, including the making of an offer of "recission" in compliance with the provisions of the Securities Act of 1933.

[27]

IV. FAIRNESS

A. Alleghany's Assets and Earnings

Before discussing the formulation and fairness of the exchange offer, we shall summarize Alleghany's earnings history, the changes in its investment holdings in recent years, and its immediate earnings prospects.

The following table presents for the years 1946-1954 the amount of Alleghany's gross and net income, exclusive of security transactions, the amount of its profits or losses from security transactions, and the net income per share, exclusive of security transactions (PS 5, 121):

Year	Gross Income from Dividends and Interest	Net Income (Loss) Exclusive of Security Transactions	Profit (Loss) from Sales of Investments	Net Income per Share of Stock (Exclusive of Profits or Losses from Security Transactions)	
				Old Preferred	Common
1946	$2,570,929	$1,593,776	$ 2,007,597	$2.16	$(.45)
1947	2,628,686	1,746,132	(13,747,895)	2.83	(.32)
1948	5,439,055	4,036,609	(6,235,210)	8.95	.33
1949	2,887,356	1,869,558	(5,583,016)	5.85	.02
1950	2,189,613	1,244,408	2,175,997	4.72	(.04)
1951	2,117,017	920,378	(605,037)	3.54	(.10)
1952	2,384,525	861,652	50,806	5.38	(.09)
1953	2,020,715	244,222	6,452,830	1.03	(.08)
1954	1,676,115	(105,247)	4,278,748	(0.15)	(.21)

[28] As will be seen from the foregoing table, in the ten year period from 1946 to 1954, Alleghany had sufficient income (exclusive of security transactions) only in two of the years, 1948 and 1949, to cover the $5.50 per share current dividend preference of the old preferred stock. As previously noted, no dividends were paid on the old preferred stock during this period, or since 1931. Until 1950, Alleghany was barred by the existence of a capital deficit from paying any dividends. Beginning in that year, it made dividend payments on account of arrears on a

formerly outstanding prior preferred convertible stock, which arrears were finally eliminated in 1953 when most of the balance of that issue then outstanding was exchanged for the presently outstanding $4 prior preferred stock.

The following table presents for the years 1946-1954, the amount of Alleghany's total net assets and net assets per share of old preferred stock and common stock (PS 5, 121):

Year-end	Total Net Assets*	Net Assets Per Share*	
		Old Preferred	Common
1946	$55,719,552	$ 76.74	Deficit
1947	50,753,586	80.92	"
1948	42,412,552	86.24	"
1949	32,929,876	97.69	"
1950	37,941,785	142.25	"
1951	37,655,260	147.37	"
1952	41,511,995	265.42	1.50
1953	34,657,540	238.14	.40
1954	67,020,845	474.93	7.21

* For the years 1946-1953, inclusive, the figures presented are based on indicated market quotations of assets, except for certain unlisted securities and joint venture investments carried at cost. For 1954, the figures presented are based on market quotations for all investments.

As the foregoing table indicates, there has been a steady increase since 1946 in the asset coverage for the old preferred stock. This increase is attributable in part to increases in value of Alleghany's assets and in part to the retirement through repurchase or exchange of a large number of shares of old preferred stock and prior preferred stock at substantial [29] discounts from their liquidation preference including dividend arrears.

There have been substantial changes in the composition of Alleghany's assets since 1946. At the end of that year, virtually all of Alleghany's investments, exclusive of U. S. Government obligations, were in securities of carriers, its holdings of 516,234 shares of C & O common stock being its most substantial investment. All of these investments,

except for certain holdings in the Missouri Pacific Railroad Company ("MOP"), were disposed of in the years following 1946. Part of the proceeds was used to repurchase shares of old preferred and prior preferred stock, and the balance was reinvested initially in a diversified list of non-railroad investments and in a large block of the common stock of Investors Diversified Services, Inc. ("IDS"), a registered investment company controlling or managing an important group of investment companies. During 1954, Alleghany disposed of the balance of its holdings of C & O common stock and most of its holdings of industrial securities and made a substantial investment in Central common stock, acquiring 286,800 shares directly and a half interest in 600,000 shares through a joint venture (PS 12A-I). During 1955, Alleghany disposed of certain other miscellaneous investments and increased its interest in Central common stock to 681,400 shares held directly and a half interest in 330,000 shares through a joint venture. At year end 1955, Alleghany's assets of $102,421,760 (taking investments at indicated market value) consisted of the following (SEC 1):

	Cash and Treasury Bills	$ 5,511,140
	Notes Receivable	16,114,421
	Guaranteed Joint Ventures[1]	14,207,385
	681,400 shares of Central common stock	31,599,925
[30]	MOP common stock	8,514,000
	IDS common stock	25,534,867
	Miscellaneous other assets	940,022
	Total	$102,421,760

Subsequent to December 31, 1955 Alleghany acquired an additional 118,900 shares of Central common stock (SEC 1).

[1] Substantially all of the joint venture in which Alleghany has a 50% interest consisted of an investment in 330,000 shares of Central common stock. Approximately $2,200,000 was invested in stock of Delhi-Taylor Oil Corporation and Lionel Corporation.

As of December 31, 1955, the claims on Alleghany's assets senior to those of both the old and new preferred stocks, included $7,000,000 of 5% debentures due 1962, $13,200,000 of notes payable to banks due on demand on August 13, 1956, and $2,020,960 of $4 preferred stock (SEC 1).

The substantial changes in the composition of Alleghany's assets in 1954 and 1955 have an important bearing on its future earnings prospects. Two of Alleghany's most important investments are not on a dividend paying basis, namely MOP and IDS (R. 1506). On January 11, 1955, the directors of Central announced that they were placing Central common stock on a $2 annual dividend basis, as compared with 50 cents paid in 1954. (PS 121.) This stock, and the notes receivable on which interest was payable, are thus the only assets held by Alleghany as of the end of 1955 on which income would be received in the immediate future.

A statement of Alleghany's income and of profit and loss on security transactions for the years 1954 and 1955 is attached hereto as Appendix A (SEC 1). As therein shown, Alleghany had total income from dividends and interest of $1,676,115 in 1954 and $2,511,379 in 1955. After payment of substantial amounts of expenses, including over $800,000 of interest on debentures and bank loans, Alleghany had a net loss of $105,247 in 1954 and net income of $316,721 in 1955, exclusive of profits from security transactions of $4,278,748 in 1954 and $1,989,172 in 1955. It may be noted that Alleghany's administrative and general expenses in 1954 and 1955 were substantially higher than in preceding years.

[31] The annual dividend requirement on Alleghany's outstanding $4 preferred stock is $103,380 and on the 1,323,440 shares of new preferred stock issuable under the exchange offer $794,064, or an aggregate of $897,444. (SEC 1, 9). The record indicates that in formulating the exchange offer, Alleghany anticipated that its income would be sufficient to meet the dividend requirements on the new

preferred stock and that in this connection Alleghany was relying on the prospect that Central common stock would be placed on a $2 annual dividend basis, (R. 1505-6). The payment of dividends is, of course, dependent upon Alleghany's earnings and financial condition. In view of Alleghany's past earnings history, it appears that payment of dividends on the new preferred stock, as well as on the common stock, will be dependent upon the ability of Central to continue its present rate of dividends and some improvement in net portfolio income or upon the availability of profits from security transactions (PS 5).

B. Formulation of Plan

David W. Wallace, Secretary and Treasurer and "house counsel" to Alleghany, testified that in November of 1954 he was instructed by Alleghany's Board of Directors and by Robert R. Young, its Chairman, to investigate the possibility of an exchange offer as a means of removing the dividend arrears on the old preferred stock (R. 1501-4; PS 1). Wallace stated he received various suggestions from members of the Board but no specific instructions as to the type of plan to be offered (R. 1505), and that he was largely responsible for the first draft of the exchange offer (R. 861). In formulating the plan as originally drafted, Wallace stated that his goal was to offer the preferred stockholders new securities which would have a value equal to their full claim on redemption of $237 per share but no more (R. 862). He explained that since Alleghany was desirous that this offer [32] should constitute a final solution to the problem of dividend arrears on the outstanding 136,000 shares of old preferred stock, it would be impractical to offer less than the preferred stockholders were entitled to on redemption, for in that case there would be stockholders who would hold out for their full claim (R. 1450-1). The plan as Wallace originally drafted it differed from the plan before us in two important respects: (i) the new preferred stock might be called for redemption at any time; (ii) the number of shares of common stock into which the new preferred stock would be convertible was to be

computed on the basis of the closing market price of the common stock on the closing date *plus one dollar*, rather than at the market price itself (R. 183, 864). The effect of this latter provision would have been to reduce the number of shares into which the new preferred stock would have been convertible. Wallace further testified that he was doubtful that the plan as originally drafted accorded as much as $237 in value, but that he advanced the plan in the hope it would be acceptable to the preferred and that he felt at that stage that if he were to err in the valuation of the new preferred stock he should err on the low side (R. 863, 1424-5).

In December 1954, Wallace submitted his draft of the exchange offer to Mr. Winthrop Lenz, a partner in charge of the buying department of the underwriting division of Merrill Lynch, Pierce, Fenner & Beane ("Merrill Lynch"), to determine whether Merrill Lynch would either underwrite the plan or agree to act as dealer-manager in effecting the exchange. Lenz testified that in considering the plan, Merrill Lynch had two considerations in mind. First, since they were record holders for customers of over 250,000 shares of common stock and over 200,000 perpetual warrants, Merrill Lynch wished to be sure that their customers who were common stockholders were not adversely affected by the offer (R. 182, 197, 201; CS 3).[1] Second, Merrill Lynch [33] wished to be sure the plan was fair to the preferred stockholders and that there was enough inducement to persuade the preferred stockholders to waive their claim to arrears of about $18,000,000 "for a conversion privilege which is a very intangible thing and which can shrink or expand very rapidly" as the price of the common stock changes (R. 201).

After consideration of the plan by Lenz and certai of his associates, Merrill Lynch suggested that the plan be

[1] Wallace stated that he considered that Merrill Lynch, in submitting suggestions as to the exchange offer, represented the interest of the common stockholders in view of the firm's large holdings of common stock for its customers (R. 836-7).

amended in two principal respects, (R. 182, 229-232). It was their opinion that unless the plan were revised to provide that the new preferred stock could not be called for a reasonable period of time, it would be undesirable from the point of view of the common stockholders. Lenz pointed out in this connection that as a result of the elimination of dividend arrears under the plan, there would be a substantial increase in the book value of the common stock. Since he considered this to be one of the principal advantages of the plan to common stockholders, he was of the opinion that there should be quite a period after consummation of the plan when the new preferred stock would remain outstanding and little conversion would take place, thus allowing Alleghany time to further increase its asset value before conversions occurred.[1] In the absence of a non-callable provision, however, arbitrage activities would result in conversion of preferred stock into common stock, and this, plus the possibility of call by the management, would act as a depressant upon the common stock. Lenz considered that such a change would also be beneficial to the preferred stockholders, since it would be unfair to them if the management could call the stock and required the preferred holders to put up the substantial cash required to meet the purchase price of $3.75 per share upon conversion. In [34] addition, Lenz recognized that the non-callable feature would add to the value of the new preferred stock (R. 182-4, 204-206, 553, 601-603, 609-610).

Secondly, Merrill Lynch suggested that the plan be amended to provide that the conversion rates be based on the market price of the common stock on the effective date of the plan, rather than that price plus $1 (R. 184-5). In explaining this advice, Lenz pointed out that a convertible preferred stock which does not contain a non-

[1] Since in converting the new preferred stock a purchase price of $3.75 per share must be paid, or the equivalent of $176.25 for each old share of preferred stock, Lenz did not anticipate that there would be many voluntary conversions until there were sufficient dividends payable on the common stock to make it worthwhile to make this substantial cash outlay (R. 186-7).

redemption provision usually sells at little or no premium over the market value of the common shares into which it is convertible (R. 547-9). The effect of the Wallace proposal to add $1 to the market price on the closing date of the exchange offer would thus be to give the new preferred stock a conversion value substantially less than $237 and make it unlikely that the exchange offer would be successful (R. 185, 550-2). To illustrate, Lenz pointed out that by adding $1 to the market price of $8.75 as of May 25, 1955, which was determinative in setting the conversion ratio under the exchange formula, the old preferred stock would have been convertible into 40 shares of common stock under the original Wallace proposal. The market value of those shares after allowing for the purchase price payable on conversion, would be $200 (R. 550-2, 1414). However, by eliminating the $1 from the formula, the old preferred stock if exchanged would be convertible into 47 shares of common stock, with a market value on the same basis of $235.

Lenz testified that he and has associates concluded that in order to be sufficiently attractive to induce the holders of the old preferred stock to accept the exchange offer, the new preferred stock would have to have a value as of the effective date moderately in excess of the claim on redemption of the old preferred stock of $237 per share, or somewhere between $250 and $260 (R. 205-6). In this connection, Lenz pointed out that the offer was being directed to the hard core of preferred stockholders who had rejected [35] the previous exchange offers (R. 181, 528). Moreover, Lenz pointed out that under the plan preferred stockholders were being asked to give up a claim on redemption of $237 in exchange for new preferred stock having a par value of $100, with all the remaining value inherent in a hightly volatile conversion privilege. Lenz explained that no one could foretell whether the price of the common stock would be higher or lower after the exchange ratio had been fixed. However, since under the plan one point decline in the common stock would be reflected in a 47 point decline in the preferred stock, Lenz stated that his

firm felt that it was necessary to offer a reasonable amount in excess of the total claim of $237 to induce the preferred stockholders to give up a considerable amount of security and assume the inherent risks involved in the conversion privilege (R. 185-6, 192-5, 528-9).

Lenz and his associates were of the opinion that if the plan were amended, as it was, to make the new preferred stock non-callable for fifteen years and to base the conversion rates on the actual market price of the common stock, the 10 shares of new preferred stock issuable for a share of old preferred stock would have a market value as of the date the conversion ratio was fixed of $250-$260 (R. 647; CS. 3a). As previously pointed out, they believed the conversion privilege alone on the basis he suggested would result in a market value of approximately $237. In addition, they believed that the non-callable provision would add to the market value of the new preferred stock about 50 cents per share of common stock obtainable upon conversion. In reaching this conclusion, they compared the new preferred stock with Alleghany's outstanding perpetual warrants, which at the time had a premium value of about $1.25, and took into account among other things that the preferred stock conversion right was a 15-year non-callable right as compared with a perpetual right for the warrant (R. 553-4, 614-6; CS. 3a). While the amount which would be added [36] to the new preferred stock by reason of the 50 cents per share value of the long-term call on the common stock would depend on the actual conversion ratio, it was their opinion on the basis of the market prices for the common stock then prevailing that this feature of the plan would add no more than about $20 or $30 (R. 147). On the basis of the actual conversion ratio of 47 shares fixed pursuant to the May 25, 1955 closing price, the non-callable feature at fifty cents per share adds $23 in value to the new preferred stock, giving it a total value of about $260.

Lenz further testified that while his firm was prepared to act as dealer manager if the changes they suggested

were adopted, his firm was not willing to consider an underwriting of the exchange offer because it would be too difficult and complicated a task and too uncertain of acceptance by the old preferred stockholders (R. 181, 200, 571-2, 574).

Wallace stated that after receiving Merrill Lynch's suggestion to change the conversion formula he concluded that they were right in urging this change and he so reported to Alleghany's management. This change was incorporated in a revised draft of the proxy statement proposing the exchange offer which was approved at a meeting of Alleghany's Board of Directors on December 28, 1954 (R. 868-70, I. 5.). However, the draft of the proxy statement approved at that meeting did not include a provision making the new preferred stock non-callable for any period of time, although this idea was apparently discussed at that meeting (R. 1541-2, 1798-1801). Wallace testified that, subsequent to Lenz's advice as to a non-redemption provision, Allan P. Kirby, President of Alleghany and the owner of 516,500 shares of common stock and 226,340 warrants as well as 12,959 shares of old preferred stock, also urged that the new preferred stock be made non-callable so as to avoid any adverse impact on the [37] common stock from disorderly conversion (R. 1367, 1537; PS 3). Kidder-Peabody & Co., which, like Merrill Lynch, was asked to submit an offer to be dealer-manager for the exchange offer, made a similar comment. Wallace further testified that he became convinced that Merrill Lynch was also right in urging that the plan in order to be successful should offer some small premium over $237, an idea which also had been discussed at the December 28, 1954 board meeting (R. 880, 1450-2, 1541-2).[1] Subsequent to that meeting, the provision making the new preferred stock non-callable until 1970 was cleared orally with members of Alleghany's Executive Committee and incorporated in the proxy statement submitted to stockholders for the meeting of February 8, 1955 at which the new preferred stock was authorized (R. 1527; PS 3).

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[1] Wallace received similar advice from Kidder-Peabody & Co.

C. Market History of Old and Preferred Stocks as Related to the Common Stock

During 1954, the market price of Alleghany's old preferred stock varied on the New York Stock Exchange from a low of 140 to a high of 210, the higher price being realized towards the end of the year; when the value of Alleghany's portfolio securities and its common stock was also increasing. The price range of the common stock in 1954 3¼-9. The following table shows the monthly price range of the old preferred stock and the common stock in 1955 through May 25, 1955, a period during which it may be assumed that trading in the old preferred stock reflected the terms of the exchange offer and before it was known that the I.C.C. through Division 4 had approved the plan (PS 20a, 20c):

	Old Preferred Stock		Common Stock	
Month	High	Low	High	Low
January	228	209½	9½	7¼
February	240	222	8⅜	7⅜
March	273	231	8¾	7¼
April	261	248½	9¼	8¼
May 1-25	268	246	8¾	8

[38] The foregoing figures are generally consistent with Lenz's estimate that the new preferred stock would have an initial market value of about $250-$260. During this five-month period, there were only 11 days when the old preferred stock traded higher than 260, and on May 25, 1955 it closed at 265½. On May 27, 1955 Alleghany announced that Division 4 of the I.C.C. had authorized the issuance of the new preferred stock and that pursuant to this order the conversion ratio would be fixed at 4.7 shares of common stock for each share of new preferred stock which was the equivalent of 47 shares for each share of old preferred stock (PS 8). The following table covers the period of 20 trading days from May 27, 1955 until June 24, 1955, the date when trading was suspended by reason of the court injunction previously mentioned. It compares the closing

price of the old preferred stock through June 6, 1955, and 10 shares of the new preferred stock as quoted on a when-issued basis beginning June 7, 1955, with the price of 47 shares of common stock obtainable on conversion, and also shows the resultant premium value apparently attributed to the fifteen-year non-callable feature of the new preferred stock (PS 20c, I 1):

[39]

Closing Price As of	Common Stock	Old Preferred Stock*	Conversion Value of 47 Shares of Common Stock**	Premium Value of 15-Year Non-Callable Right of New Preferred Stk.	
				For 47 Shs.	For 1 Sh.
May 27	8⅞	277½	240⅛	36⅝	.78
31	9½	292	270¼	21¾	.46
June 1	9⅞	300	287⅞	12⅛	.26
2	10	316	293¾	22¼	.47
3	9⅞	315	287⅞	27⅛	.58
6	9⅞	311	287⅞	23⅛	.49
7	9⅞	326¼	287⅞	38⅜	.82
8	10	340	293¾	46¼	.98
9	10	316¼	293¾	22½	.48
10	10⅛	323¾	299⅝	24⅛	.51
13	10⅛	333¾	299⅝	34⅛	.73
14	10	333¾	293¾	40	.85
15	10	348¾	293¾	55	1.17
16	10	346¼	293¾	52½	1.12
17	9⅞	340	287⅞	52⅛	1.11
20	9⅞	341¼	287⅞	53⅜	1.14
21	9⅜	337½	264⅜	73⅛	1.56
22	9⅝	338¾	276⅛	62⅝	1.33
23	10¼	348¾	329	19¾	.42
24	10½	352½	317¼	35¼	.75

* Prices are for old preferred stock through June 6, 1955 and for 10 shares of new preferred stock as quoted on a when-issued basis beginning June 7, 1955.

** After allowance for price of $3.75 per share payable on conversion.

[40] As shown by the foregoing table, the premium value attributable to the fifteen-year non-callable feature of the new preferred stock in the 20-day period covered before

trading was suspended, varied from as little as $.26 to as much as $1.56 per share of common stock obtainable upon conversion. The average value for the period was $.80. Most of the higher values were realized in the period after June 7, 1955, when when-issued trading was in effect. During the same 20-day period the premium value of the perpetual warrants averaged about $.87, and was as low as 50 cents and as high as $1.25. In interpreting these figures, it must be borne in mind that the period covered is a relatively short one and that trading in the preferred stock is not necessarily synchronous at every moment with the common stock. Moreover, as the expert witness testified, trading in a when-issued market may produce somewhat higher prices than otherwise, because of the reluctance of security holders to sell on a "when-issued" basis and the availability of 25% margin for purchasers and for these reasons there is usually more interest on the "buy" than the "sell" side of such a market (R. 215, 631, 993, 995).

Nevertheless, the possibility exists that the premium value which will be attributed to the fifteen-year non-callable feature of the new preferred stock may be somewhat higher than 50 cents per share of common stock obtainable upon conversion. If this premium value were as high as 75 cents per share, then the total premium attributable to the 47 share conversion right applicable to one share of old preferred stock when exchanged would be about $35, and the total value for this stock as of May 25, 1955, when the conversion ratio was fixed would be $270, or a [41] premium of about 14% over the redemption price of $237 on the old preferred stock.[1] Lenz considered that a value of

[1] The record contains a comparison of the week-end closing prices of the perpetual warrants, and the common stock for the 67-week period from December 3, 1954 to March 9, 1956 (SEC 12). The premium value of the perpetual warrants during this period ranged from a high of $1.44 to a low of $.50 and averaged $1.02. For purposes of measuring the comparative value of a fifteen-year right with a perpetual right, the average premium value of $1 for the perpetual warrant might be considered the equivalent of the right to 10 cents in earnings per year discounted in perpetuity at

as much as $270 for the preferred would fall within a range of fairness to the common stock (R. 647). He pointed out that there was no scientific way of computing or estimating the premium value of a long-term option, but that such an estimate was a matter of judgment on the basis of past experience with other securities (R. 613, 618). Even if the premium value proved to be a little greater than estimated, Lenz apparently felt that the fairness of the exchange offer would be unaffected since in formulating the plan one could do no more than estimate in advance as closely as possible the amount of premium necessary to convince the preferred stockholders to take the considerable risk involved in making the exchange (R. 613).

[42] The preceding table also shows that in the period after the conversion ratio was fixed as of May 25, 1955, the price of the old preferred stock (or its equivalent in new preferred stock) rose substantially above $260, and sold as high as $352. Intervenors rely to a considerable extent on this price history as a basis of demonstrating the alleged unfairness of the exchange offer.

It was, of course, implicit in the plan that on the date as of which the conversion ratio was fixed the common stock into which the new preferred stock was convertible would have a quoted market value of about $237, and that thereafter the conversion value of the new preferred stock, and therefore its market price, would vary as the market value of the common stock moved up or down. Since the price of the common stock in the period subsequent to May 25, 1955, increased from 8¾ to as much as 10¾ (I 1), it was to be expected that the price of the new preferred stock would

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10%, which would also be worth $1. In comparison, the right to 10 cents in earnings per year payable for fifteen years, discounted at 10%, would have a present value of about 75 cents.

Besides Lenz's views, the record also contains testimony by another expert witness that the fifteen-year non-callable right of the new preferred stock to be converted into common stock would have a value of between 50 cents and something less than $1 per share of common stock, but that it was a matter of "guesswork" until the preferred stock was issued and a "normal" market obtained (R. 989-991).

increase proportionately, and the fact that this occurred does not in itself demonstrate the plant's unfairness to the common stockholders. Nor would the plan have been unfair to the preferred stockholders if the price of the common stock immediately after May 25, 1955 had proved to be lower than 8¾, thus causing the new preferred stock to sell for less than $237. Indeed, there have been periods since the conversion ratio was fixed, particularly during January, February and June 1956, when the common stock generally traded below 8¾ (PS 20A). The effect of upward or downward movements of the price of the common stock on the price of the new preferred stock, once the conversion ratio was set, were risks assumed by both the common and preferred stockholders under the terms of the exchange offer.

[43] The rise in the market price of the old preferred stock after the conversion ratio was fixed might be evidence of the plan's unfairness only if the rise in the market price of the common stock which also occurred in this period was attributable to the plan itself rather than to independent factors such as an increase in the value of Alleghany's portfolio. The record shows that the underlying asset value of Alleghany common stock increased substantially after May 25, 1955, as a result of increases in the market prices of Central and IDS stocks, Alleghany's principal investments. Thus, between May 25, 1955, when Alleghany's common stock was traded at 8¾, and June 22, 1955 when it closed ⅞ higher at 9⅝, the underlying asset value increased by $1.13 per share of common stock, primarily as a result of rises in the prices of Central common stock from 40½ to 44¾, and of IDS stock from 65 to 82 (SEC 9).

While Lenz considered that the rise in market price of Alleghany's common stock which occurred in June 1955 reflected increases in its underlying asset value (R. 209), there is some indication in his testimony that not all of the benefits to be realized by the common stock from the plan would be reflected in its market price in advance of its consummation (R. 204, 210-12, 656-661). Indeed, Lenz

expressed the view that Alleghany's common stock would continue to sell, as it had in the past, at a premium over its asset value, so long as that asset value is increasing (R. 561), and that Alleghany's common stock might be expected to increase to the extent of the $3.80 per share increase in asset value resulting from the elimination of dividend arrears under the plan (R. 648-9).

[44] Arthur M. Leinbach, a railroad security analyst for Kidder, Peabody & Co., also testified as an expert witness and expressed the opinion that the exchange offer was fair both to the preferred and common stockholders. Originally, in his consideration of the plan in January and February 1955, he also anticipated that the price of the common stock would increase after consummation of the plan to some premium over the increased asset value resulting from the plan, and that this increase would be reflected in an increase in the market price of the new preferred stock (R. 1010, CS 2, 5). When he appeared in the proceeding, he explained that he had changed this view and no longer anticipated that the Alleghany common stock would be one which sold at a premium over its asset value (R. 1009). Rather, it was his opinion that like other investment companies it would sell at some discount from asset value, probably at a price of between 25% and 40% less than the increased asset value which would prevail as a result of the elimination of dividend arrears under the exchange offer (R. 1003-1006). Leinbach also stated that he believed that prior to the effective date of the exchange offer, the market price of the common stock would largely reflect the benefits anticipated from the increase in asset value as a result of the exchange offer (R. 1273, 1320).

Wallace testified that Alleghany's officers, including Young and Kirby, anticipated that most of the benefits of the plan to the common stock, including the increased asset value, would be reflected in the market price of the common stock prior to the date on which the exchange ratio was fixed, although it was recognized that there might be some slight increase as a result of the plan after that date. He

further stated that they did not anticipate that the approximately $3.80 increase in asset value which [45] results from the exchange offer would be accompanied by a similar increase in market value (R. 1554, 1557). Rather, they anticipated that Alleghany, like other closed-end investment companies, would sell at some discount from its asset value, although no one was sure of the extent of that discount (R. 415, 1558). In this connection, Wallace adverted to a number of changes in Alleghany's circumstances which made it unlikely that the premium over asset value which had formerly prevailed in the market would continue, but instead suggested a contrary expectation. He noted that the price of the common stock had risen to a point where it was no longer a very low-priced stock, and he pointed out that the rise in asset value of such holdings as IDS which was anticipated when the stock was selling at a premium had now been realized (R. 1555, 1558, 1561). The record indicates that Alleghany's common stock sold at a premium over its asset value until April 1955. Thereafter, as the asset value increased, the market price remained relatively stable and the stock sold at a discount. On May 25, 1955, the date as of which the exchange ratio was set, the closing market price was 8¾, which represented a slight discount from the net asset value per share on that date of $8.79, before giving effect to the exchange offer, and a discount of about 30% from the asset value of $12.55 per share, giving effect to the consummation of the exchange offer. Thereafter, as Alleghany's asset value has continued to increase, the market discount has widened somewhat (PS 19A, 19B; SEC 9).

Taking into account the considerable rise in the market value of Alleghany's most important portfolio assets, namely, Central, IDS and MOP common stocks, the fact that only one of these holdings yields dividend income to Alleghany and the somewhat remote dividend prospects for [46] Alleghany's common stock, the discount from asset value at which Alleghany's common stock sold on May

25, 1955 and subsequently, does not appear out of line with what might be expected in comparison to other closed-end investment companies. In addition, in our judgment, on the basis of the record, there is no reason to consider the exchange offer unfair on the grounds that there was some significant element in it which would produce an increase in the price of the common stock, and therefore the preferred stock, after the conversion ratio was set. On the contrary, it is reasonable to conclude that the market price for Alleghany's common stock as of May 25, 1955, largely, if not entirely, anticipated the benefits expected to inure to the common stock as a result of the exchange offer.

D. Net Asset Value of Alleghany Common Stock

As previously stated, the net asset value of Alleghany's common stock on May 25, 1955, when the conversion ratio was set, was $8.79 per share, before giving effect to the issuance of the new preferred stock. Giving effect to the issuance of that stock, it would increase to $12.55. Assuming the conversion of all the new preferred stock into common stock, the net asset value would have been $8.73 per share (SEC 7). On this basis, it appears that from an asset point of view the plan provided for the exchange of preferred stock with a preferential claim on assets of $237, for new preferred stock with a preferential claim on assets, as preferred stock, of only $105 but with the right to be converted into common stock which would have an asset value of approximately $237.

These calculations, however, do not make allowance for the reduction in asset value which would result from (i) the conversion into common stock of the 25,262 outstanding shares of $4 preferred stock, each share of which has an $80 stated value and is convertible into 16 shares of common stock, [47] or at an effective price of $5 per share; (ii) the exercise of an option held by Young to purchase 100,000 sh. -es of common stock at $3.0625 per share, which expires May 1, 1961; and (iii) the exercise of the outstand-

ing perpetual warrants to purchase approximately 2,000,000 shares of common stock at $3.75 per share. If conversion of these three items were assumed as of May 25, 1955, the asset value would have been reduced to $7.09 per share. Assuming further that all of the shares of new preferred stock issued under the exchange offer were converted into common stock as of May 25, 1955, the asset value of the common stock would have increased 74 cents from $7.09 to $7.83 (SEC 6). Thus, on this basis the 47 shares of common stock obtainable on conversion by a holder of a share of old preferred stock who accepted the exchange offer would have an asset value of $191.76, or approximately 20% less than the $237 claim (R. 1419).

The foregoing calculations may be somewhat theoretical since there is testimony indicating that early conversion of the new preferred stock into common stock is not very likely, and the likelihood of conversion of the perpetual warrants is even more remote (R. 599-600, 601-603). The record suggests that a somewhat greater likelihood exists for near-term conversion of the $4 preferred stock, which sells at little or no premium and in which arbitrage activity may therefore force conversions (R. 600). In addition, if the common stock were placed on a favorable dividend basis, conversion of the $4 preferred stock would be increased. It also appears likely that the option held by Young would be exercised before it expires in 1961 (R. 1421). If conversion of these latter two items were assumed as of May 25, 1955, the asset value of the common stock would have been $8.38 before giving effect to the issuance of the new preferred stock, $11.77 after giving effect to the issuance of that stock, and $8.55 upon the further assumption that all the new preferred stock were converted into common stock.

[48] In considering Alleghany's net asset value as reported, it should be noted that no allowance has been made for the capital gains taxes which would be payable upon the excess of unrealized gains over unrealized losses in the event of realization of Alleghany's investments (R.

1427). Provision for such possible tax liability is required by our Regulation S-X as applicable to investment companies. As of May 25, 1955, such potential tax liability amounted to approximately $2,900,000, and allowance therefor would reduce the net asset value of the outstanding common stock about $.62 per share.[1]

It thus appears that as of May 25, 1955 the underlying net asset value of the common stock obtainable on conversion of the new preferred stock would be less than the $237 claim of the old preferred stock. From the viewpoint of the common stock, issuance of the new preferred stock results in a substantial increase in net asset value which would be applicable for the relatively long period it was anticipated that the new preferred stock would remain unconverted. While the effect of subsequent conversion of the new [49] preferred stock would be a reduction in that increased net asset value, the resultant figure would be somewhat higher than the net asset value per share as of May 25, 1955, before issuance of the new preferred stock.

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[1] A footnote to Alleghany's balance sheet as of December 31, 1955, discloses that no provision had been made for certain pending tax claims by the Government amounting to $1,160,000. Alleghany apparently believes that it has a reasonable defense for this claim (SEC 1).

Intervenors claim that Alleghany possessed a contingent "asset" (R. 21386) in the possible recovery which might result from the stockholders' derivative actions which had been brought on behalf of the company. (See SEC 13, 14, R. 2299, 2300). They argue that the plan provides a "free ride" to the preferred stockholders on this contingent asset. Obviously, whether there will ultimately be a recovery and whether after deduction of counsel fees, taxes and attributable expenses this would materially increase Alleghany's assets so as to affect the fairness of the plan is a matter of speculation.

In considering fairness under this plan we do not think it appropriate to attempt to evaluate the contingent liability represented by the tax claim and the contingent asset represented by the stockholders' derivative actions in an effort to determine a net balance.

E. Absence of Overreaching

In considering the fairness of this plan we have been acutely aware that Young and Kirby together owned approximately 20% of the outstanding old preferred stock and we would have grave question of the propriety of their participation in the plans' benefits were there convincing evidence, apart from such ownership, indicating overreaching on their part or use of inside information for personal gain.

In their reports filed with this Commission on Form 4 ("ownership reports") Young and his wife indicate that at the beginning of 1952 they owned approximately 25,800 shares of the old preferred stock. These same reports show that all but 1200 of these shares were exchanged for Alleghany's debentures and warrants in October 1952, pursuant to an exchange offer made at that time. Young testified that this was done under "pressure" from other officers to ensure the success of the exchange offer, although he desired to remain a preferred stockholder. (R. 428, 434, 435). The prospectus filed in connection with that exchange offer disclosed Young's intention to replace his preferred stock holdings. (SEC 2C).[1] Pursuant to this intention he and his wife had acquired shares of old preferred stock and held 14,617 shares on May 5, 1954 the date of Alleghany's annual meeting for the year. At the 1954 annual meeting one of the Alleghany security holders who was [50] present raised the question of Alleghany's future intention with respect to the arrears on the old preferred stock (SEC 4). Young and Wallace both testified that it was Young's promise, made at that time, to consider something within the year that occasioned their consideration of the plan in November of 1954 (R. 394, 397, 1501). From May to November 1954 Young had a standing order for the purchase of old preferred stock with his broker and 600 shares were acquired. (R. 437, 440, ownership reports). The ownership reports

[1] Young had participated in earlier exchanges for the same reason and with the same statement of future intentions (R. 429, SEC 2(B), 2(C)).

disclose that the Youngs exchanged their holdings of 14,825 shares of old preferred stock for new preferred stock.

The ownership reports show that Kirby held approximately 13,000 shares of old preferred stock which he exchanged for new preferred stock. These shares were the residue, in the main, of larger holdings which he had for many years, his last purchase being in 1950. Kirby also held in excess of 500,000 shares of common stock and as the largest single holder of that stock was considered a common stock representative. (R. 409, 418, 427).

In light of all the testimony concerning the history of the plan, its consideration by independent advisors, the nature and reasons for the various changes in the plan, and the lack of any evidence which would impeach the motives or actions of Young and Kirby as officers of the corporation with respect to the plan, or in Young's case in making purchases of stock, we cannot find any equitable reason why either Young or Kirby should be denied participation in the plan as one of a class of stockholders. Nor can we find, as suggested by intervenors, that motives or actions of these persons have resulted in any unfairness in the plan.

[51]

F. Conclusions as to Fairness

The question of fairness presented by the plan is essentially two-fold. First, do the new securities accorded the old preferred stockholders under the exchange offer adequately compensate them for the rights which they surrendered? Second, in the exercise of a sound business judgment, are the values surrendered by the common stock (i.e. the new preferred stock) reasonable in the light of the benefits which the common stock might expect to receive under the plan?

The old preferred stock, as previously stated, had a preferential claim to dividends of $5.50 per share plus unpaid dividend arrears of $132.00 per share as of May 1, 1955 before any dividends could be paid on the common

stock. This preferential claim could only be terminated by payment in cash of its stated redemption price of $105, plus the dividend arrears of $132, or a total of $237.[1]

The principal purpose of Alleghany in proposing the plan was the elimination of arrears on the old preferred stock since they constituted a legal barrier to the payment of dividends on the common stock. The record discloses that for various reasons Alleghany did not consider the payment of the arrears in cash or a cash redemption of the old preferred stock either legally feasible or desirable as a matter of business judgment. Cash in the amount needed for either of these alternatives was not available, and because of bank loan restrictions Alleghany was not wholly free even to use available cash to pay dividend arrears. [52] Sale of a substantial portion of the company's assets to raise cash was not considered in the interest of the common stockholders, since it would result in a contraction of the company's business and thereby reduce the interest of the common stockholders in the earnings and growth potential of the company. Nor was it deemed feasible to obtain the cash needed for retirement of the preferred claim by sale of new Alleghany securities on the open market. (R. 571-2, 574, 967, 1503, 1573, 1576-7, 1590-1).

The company sought through the exchange offer to persuade the holders of the old preferred stock to voluntarily relinquish their senior claims which were relatively well secured and for which there was an asset coverage as of December 31, 1954 of approximately $475 per share, and as of May 25, 1955, of approximately $530 per share (SEC 9, PS 12 I). The new securities which were offered in exchange were of a much more speculative character than the old preferred stock. Apart from its conversion features, the new preferred stock offered for each share of old pre-

[1] The old preferred stock also had a preferential claim in voluntary liquidation of $237, and in involuntary liquidation of $232. However, the record does not indicate that there was any reasonable prospect that these claims would become operative in the foreseeable future.

ferred stock was entitled to a cumulative annual dividend peference of $6, had a par value of $100 and was redeemable at $105. While the annual dividend preference on the new stock was slightly higher than the old stock, this was of little significance, since no return was being offered on the unpaid dividend arrears and the record indicates that the new preferred stock as such was of such speculative quality that its market value would have been less than its par value (R. 612). It was primarily because of its conversion features that it was considered that the new preferred stock would have a value sufficient to induce the old preferred stockholders to accept the exchange, and because of the speculative character of the conversion privilege, it was considered necessary to offer some premium over the [53] redemption claim of $237 in order to induce such acceptance. As we have seen, the plan was so devised that on the date the conversion ratio was fixed, the new preferred stock offered in exchange would be convertible into common stock which would have a market value of approximately $237, thus giving the new preferred stock a market value of at least this amount. It was also anticipated that the market value of the new preferred stock would be somewhat higher than this conversion value, because it could not be redeemed for fifteen years.

While the market value of this non-callable feature could not be determined in advance with precision, it was the best judgment of the experts who advised Alleghany with respect to the plan that this feature would add a premium equal to approximately 50 cents per share of common stock obtainable on conversion. On this basis, the new preferred stock issuable under the exchange offer may be considered to have had a fair market value as of May 25, 1955, when the conversion ratio was fixed, of approximately $260. In our previous discussion, we have indicated that on the assumption that the estimated premium value of 50 cents per share was too low and that it should be estimated at 75 cents per share, the fair market value of the new preferred stock as of May 25, 1955 would be approximately $270.

Intervenors contend that it is improper to offer the old preferred stockholders more than their redemption price of $237. It may be conceded that if Alleghany had been prepared to pay off the preferred stockholders in cash, it could not lawfully have paid more than the stated redemption price of $237. However, for reasons which we consider persuasive, Alleghany did not consider it feasible or desirable to redeem the old preferred stock in cash. Under the circumstances, we cannot consider that the redemption [54] price sets a ceiling on a voluntary bargain made outside of the governing charter provisions for a relinquishment of the rights thereunder.[1]

In view of the advantages accruing to the common stockholders from the exchange offer, and the necessity for providing sufficient inducement to the preferred stockholders to accept the exchange, we do not believe that there is any basis for finding that the amount of the premium offered the preferred stockholders under the exchange offer was so great as to place it outside the permissible limits of fairness.

In this connection, we note that the anticipated market value of the new preferred stock was not one which could be immediately realized by all of the old preferred stockholders. The record indicates that if any substantial number of stockholders attempted to dispose of their shares immediately upon the consummation of the exchange offer, the premium would certainly narrow and probably disappear (R. 1272). Consequently, most of the old preferred

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[1] Intervenors argue that the "fair and equitable" standard of Chapter X of the Bankruptcy Act and the Public Utility Holding Company Act of 1935 are applicable in this case and since under this standard we have held the redemption price to be a ceiling on a preferred stockholders' claim in reorganization we should so hold here. We believe it abundantly clear that the standard of fairness applicable to voluntary reorganizations under the Investment Company Act was not intended to, and does not, encompass the strict standards applicable to judicial reorganizations. In so disposing of this argument we do not mean to imply complete agreement with Intervenors' statement of the applicable standards unded Chapter X and the Public Utility Holding Company Act.

stockholders who accepted the exchange offer would have to retain their investments for varying periods of time, [55] during which they would be exposed to marked fluctuations in the price of their new preferred stock based on fluctuations in the price of the underlying common stock. A decline of 50 cents per share in the price of the common stock would eliminate most, if not all, of the premium, and a decline of $1 per share would result in a market value for the new preferred stock less than $237. We believe that the market premium provided pursuant to the exchange offer to induce the holders of the old preferred stock to assume this risk was not excessive in the exercise of reasonable business judgment when such premium is weighed against the advantages produced for the holders of the common stock.

The exchange offer was accepted by the holders of 97% of the old preferred stock. As a result of the elimination of the dividend arrears on this stock as a claim senior to that of the common stock, the net asset value of the common stock was increased by $3.76 per share. This increased asset value would be applicable to the common stock as long as the new preferred stock remained unconverted, and as we have seen, early conversion of that stock was not anticipated. In addition, the elimination of the arrears paved the way for payment of dividends on the common stock.

[56] As we have pointed out in our previous discussion, there is some possibility that as of the date the conversion ratio was fixed, the market price of the common stock did not fully discount the benefits to be realized by the common stock as a result of the exchange offer. To the extent this was so, the market price of the common stock would increase after consummation of the offer, and the preferred stockholders would receive an additional market premium. However, on the basis of the record, we have found that it is reasonable to conclude that the market price of the common stock as of May 25, 1955, largely, if not entirely, discounted the benefits anticipated from the offer. It would

obviously have been impracticable to have sought to obtain acceptance by the old preferred stockholders of an offer whose value would depend upon something as conjectural as a rise in the price of the common stock after the conversion ratio was fixed. For this reason, and the apparent *de minimis* nature of this probability, we do not believe that the plan is unfair because there may have been some relatively slight extent to which the benefits from the exchange offer were not fully anticipated.

Finally, in considering the fairness of a voluntary offer like this exchange offer, weight may appropriately be given to the overwhelming approval of this offer by all classes of stockholders of Alleghany.

Upon the basis of the record, and after consideration of the contentions of all the parties to this proceeding, we conclude that the terms of the exchange offer were not such as would place them outside the range of fairness.

[57]

V. INTERVENORS' OBJECTIONS TO THE GRANTING OF THE REQUESTED RELIEF

The intervenors have raised some 31 objections to the granting of the requested relief. We shall discuss them *seriatim*, the letter designations being those in the intervenors' briefs.

(A) Intervenors contend that the notice of the hearing in this case was not served on all the Alleghany security holders and that this was a violation of due process. Notice was given in conformity with the Administrative Procedure Act. Although not required by that Act, actual notice was given the intervenors. We conclude that our notice procedure in this case met the requirements of due process.

(B) Intervenors attack the jurisdiction of the Commission to entertain the applications. In the main it is said that the pendency of the appeal to the Supreme Court of the United States in the *Breswick* case vests in that court exclusive jurisdiction over the exchange plan; and that in

any event it is improper for us to act at this time in view of that appeal. As we read the various opinions and appeal papers, it is clear that so far as the Investment Company Act is concerned the three-judge court decided that Section 7 was applicable to Alleghany and because of its violation the consummation of the plan was enjoined. The appeal attacks the jurisdiction of the three-judge court to so decide. [58] These instant proceedings start with the assumption of the applicability of Section 7 and are concerned with the propriety of an exemption therefrom in light of the other standards of the Act, a matter over which we have exclusive original jurisdiction and which is not before any court. Our proceedings complement rather than conflict or interfere with any jurisdiction of the courts.

Further we point out that in the absence of a stay of the order of the three-judge court declaring Alleghany to be an investment company, we cannot properly refuse to entertain and decide its application filed as a registered investment company, even though we recognize that a reversal by the Supreme Court of the order of the three-judge court might have the effect of making our action herein a legal nullity.

(C) Intervenors argue that the fairness of the exchange plan is in issue before the courts and we are therefore precluded under Section 25(b) from rendering an advisory report with respect thereto. It is evident from our preceding discussion of Section 25(b) that our decision herein is not an advisory report.

(D) Intervenors argue that the applications herein are in violation of the three-judge court's injunction. As we have stated, we believe these proceedings are consistent with and complementary to the injunction, and the same view pertains to the filing of the applications.

(E) Intervenors argue that we have no power to exempt a violation of the Securities Act of 1933. We agree.

(F & G) Intervenors argue that we have no power under Section 6(c) to exempt a transaction from the provisions

of Section 7, or to exempt a consummated transaction. We have answered these contentions earlier in the opinion.

[59] (H) Intervenors argue that granting the application would violate the Constitution of the United States as impairing the obligation of a supposed contract between the common and preferred stockholders, insofar as the exchange offer stated that it would be consummated only if it were approved by an order of the ICC. We find no contract between the common stockholders and any one. So far as the preferred stockholders are concerned, even assuming the correctness of intervenors interpretation of the contract, the fact remains that the preferred stockholders by various actions ratified their contract by practical construction and shall have further opportunity to do so in light of our condition to be imposed herein. And finally our action herein is permissive and thus not operative on that contract.

(I) Intervenors contend that the material sent the stockholders in soliciting their proxies to amend the charter so as to authorize the new preferred stock and additional shares of common stock was false and misleading and that common stock assent was therefore not "lawfully procured". Whether the consequence of such "unlawfulness" is that the transaction was void or unfair to the common stock does not appear from intervenors' brief. We find neither, having satisfied ourselves that the more than 17 allegations of intervenors in most respects are frivolous and argumentative and that *in toto* the proxy material met the statutory standards.

(J) Intervenors argue that the provision in the plan that it was subject to ICC approval by May 31, 1955 meant that an order of the full ICC had to be entered prior to that date. It is said that since the full ICC order reviewing the order of its Division 4 of May 26, 1955 was not entered until June 22, 1955, the exchange offer expired, and "Alleghany was without authority to proceed further with the plan." We are not convinced that this was in any respect

a material element of the plan so [60] far as the corporation or its security holders were concerned. But even assuming that it was, we reject the argument for the same reasons adverted to in paragraph (H) above. Moreover, we are unable to determine from intervenors' brief what the legal consequences are which are supposed to follow from this lack of authority, i.e. whether the transaction is alleged to be void, unfair or violative of some contractual right.

(K) and (L) Intervenors argue that because the closing date for the plan was changed pursuant to the ICC order, it was "illegally fixed" and the conversion ratio depending upon the market price of the common stock on the closing date was also not "lawfully established". This alleged unlawfulness is stated to result in "no pending or completed transactions or actually existing convertible securities pending before this Commission for action, approval or exemption." We dismiss this as frivolous, particularly in light of Mr. Justice Harlan's partial stay of the injunction permitting trading in these securities.

(M) Intervenors allege that acceptance by the Alleghany directors of the ICC change in the settlement date constituted an "unlawful modification of the exchange offer contract". As stated in paragraph (H) above, we cannot find a contract with the common stockholders to issue the new preferred stock, and even if we could, the change in date was not of its essence or material thereto. Furthermore, assuming the action was "unlawful", the legal effect this would have in the present case does not appear from intervenors' brief. We therefore dismiss the argument.

(N, O, P) Intervenors contend that the preferred stockholders should not receive over $237 and therefore the plan is unfair to the common stockholders. This is answered in our discussion of fairness. To the extent that intervenors argue various determinations of the ICC were improper in reaching [61] its conclusion of fairness we point out that we are making our own independent determination of this question.

(Q and R) The questions of arms-length bargaining raised herein are answered under our discussion of fairness. There is no legal requirement that the exchange terms be reached by arms-length bargaining apart from the question of fairness.

(S) Intervenors argue that the non-disclosure of certain facts in the proxy material constitute a fraud upon the common stockholders. For the reasons given in paragraph I above we dismiss this argument.

(T) Intervenors argue that the plan destroyed the premium value of the common stock, from which they argue that the plan is disadvantageous to the common stock. The evidence does not support the argument. The common stock had been selling in excess of net asset value and has sold for less than net asset value since the spring of 1955. The Record discloses other factors than the exchange offer which would account for this fact.

(U) Intervenors argue that the plan is unfair to the common stockholders in depriving the corporation of the opportunity to purchase additional shares of old preferred stock on the market at a discount. In light of the standards of the Act, and intervenors apparent recognition of them by failure to contend that the preferred stockholders should receive less than their $237 claim, we can give no weight to this argument.

[62] (V) Intervenors argue that there was no "hard core" of stockholders that would have to be induced to make the exchange by an offer in excess of $237. In effect this argument is only that the judgment of the several persons so believing was bad. We have already found that on the basis of the facts it was a reasonable judgment.

(W) On the assumption that the plan was unfair, and other unsupported assumptions, some of which we have dealt with above, intervenors argue that the acts of several of the officers constitute a gross abuse of trust. In the light of our conclusions on the fairness of the plan and

other issues, we believe that the record fails to support this argument.

(X, Y and Z) Intervenors arguments here with respect to the standards and considerations of Section 18(d) are dealt with at length above.

(AA) Intervenors argue that Alleghany has acted in "bad faith" or at least has not sustained the burden of proving its "good faith". While the consequences of this argument do not appear from the intervenors' brief, we take it to mean that Alleghany is not entitled to the exemptive relief which it here seeks. Whatever the merits of the argument, it is clear from our preceding discussion that we are motivated by the equities and plight of the security holders as was Mr. Justice Harlan in staying the effectiveness of the injunction in part.

[63] (BB) Intervenors impute to every preferred stockholder a constructive knowledge of the various ICC decisions and the claims they (the intervenors) were asserting before the ICC and the courts in an apparent effort to dispel any equities on the part of the preferred stockholders in seeking enforcement of "their illegally-made contract". We dismiss this contention without further discussion in light of our conclusions above.

(CC) Intervenors allege without any substantial basis that the common stockholders application is "tainted by fraud" and therefore should be dismissed. We do not agree.

(DD) Intervenors argue that all the evidence adverted to above in respect to fairness must be disregarded because of partisanship and self-interest of all the witnesses, despite Phillips's characterization of one of them as a "perfectly honest witness" (R. 1058). We find no support for this contention nor can we agree with the further contention that the record does not contain reliable, probative or substantial evidence sufficient to support our findings.

(EE) Intervenors contend that they were deprived of a fair hearing and opportunity to prove their case. First

they contend that counsel for Breswick and Bailey were denied opportunity for cross examination because continuances were denied him when he had obligations to other clients requiring his [64] presence before the courts. Without detailing the continuances that were granted, we note that Brussell, counsel for the above mentioned intervenors, voluntarily absented himself from a large portion of the hearings, and the record supports the conclusion that every reasonable courtesy was accorded him to conduct his case when he was physically unable or for other reasons indicated he would not be present. The claimed right of Brussell under the Administrative Procedure Act to have hearings held with "due regard to the convenience and necessity of the parties or their representatives" does not compel us to make our administrative processes secondary to every conflicting business engagement of counsel.

Second, Phillips contends that he was denied opportunity for calling a witness to rebut certain testimony of Young or to testify to other "crucial matters". The facts are that during a period of weeks when this witness could have been produced he was not, but at the concluding session Phillips sought to hold the proceedings open beyond the next day acceptable to the Trial Examiner, because the witness had to take care of his office on that day. (R. 2298).

The offer of proof as to this proposed witness indicated that he would testify to what he, as attorney for certain stockholders of Alleghany, expected to prove in certain derivative stockholders actions brought in Alleghany's behalf. The complaints and answers in those actions had already been placed in the record in these proceedings.

[65] Phillips also contends that he was prevented from cross examining Young with respect to statements made in the 1955 Annual Report of Alleghany concerning the management's achievements. In this regard the Annual Report was irrelevant to these proceedings and we have not considered these statements. There can be no prejudice

to Phillips in this action of the Trial Examiner. He further complains that he was prevented from questioning Young with regard to the pending stockholders derivative actions. The testimony sought to be adduced was irrelevant in the main and the witness incompetent to testify to any of it.

Intervenors argue that the record shows that the Trial Examiner did not decide the objections which they made on the merits and did not conduct a fair hearing. We believe the records shows to the contrary; that under trying and vexatious circumstances the Trial Examiner acted with commendable fairness. He considered each objection on its merits and took care to afford all intervenors full and complete argument with respect to any matter of substance presented. He certified numerous procedural questions to this Commission for determination during the course of the hearings.

Finally, Phillips complains of the Trial Examiner's ruling in effect quashing a subpoena issued to compel the attendance of Allen R. Kirby, Alleghany's president. There was convincing testimony of a heart specialist and Kirby's personal [66] physician that to compel his attendance might endanger his life. The record also contained substantial medical testimony given before a Referee in a proposed settlement of the derivative stockholders action and the refusal of the Referee to compel the attendance of the witness Kirby. In our opinion the Trial Examiner properly exercised his discretion in refusing to compel the witness's attendance.

[67]

VI. CONCLUSION

For the reasons stated we reach the following conclusions:

(1) The Commission has authority and jurisdiction to consider the applications herein and to issue the order requested.

(2) Specifically, we may grant an exemption from Section 7 of the Investment Company Act with regard to past transactions pursuant to Section 6(c) of the Act.

(3) Despite the possible conflict with Section 18(d) of the Act, the public interest, the protection of investors, and the purposes and policies of the Act are better served by granting the exemption.

(4) The issuance of the new preferred stock violated the Securities Act of 1933; accordingly, we will condition the exemption from the Investment Company Act upon the making of an offer of rescission and registration under the Securities Act of 1933.

(5) The exchange plan is within the range of fairness to all persons concerned.

(6) Other points raised present no obstacle to granting the applications.

Accordingly we find, pursuant to Section 6(c) that it is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act to grant the requested exemption subject to the condition [68] hereinabove set forth.

An appropriate order will issue.

Respectfully submitted,

HAROLD C. LOHREN
Harold C. Lohren
Attorney for the Division of Corporate Regulation of the Securities and Exchange Commission

RAY GARRETT, JR.
Director of the Division of Corporate Regulation of the Securities and Exchange Commission, of Counsel.

June 19, 1956

Appendix A

ALLEGHANY CORPORATION

Statement of Income
Year ended December 31, 1955
with comparative figures for 1954

	1955	1954
Income (exclusive of security transactions):		
Dividends	$1,593,000	$ 702,529
Interest earned on investments	342,714	246,796
Other interest and miscellaneous	575,665	726,790
Total income	2,511,379	1,676,115
Expenses:		
Interest on debentures and bank loans	874,354	881,061
Amortization of debt expenses	9,387	13,434
Administrative and general expenses	1,143,512	829,098
Advances and expenses re Missouri Pacific Railroad Company reorganization	92,405	57,769
Total expenses	2,119,658	1,781,362
Income (loss) (exclusive of profit and loss on security transactions) before provision for Federal taxes on income	391,721	(105,247)
Provision for Federal taxes on income (including $40,000 for prior years)	75,000	—
Net income (loss) (exclusive of profit and loss on security transactions) transferred to earned surplus (deficit)	$ 316,721	$ (105,247)

Statement of Profit and Loss on Security Transactions

Net gain on sales of securities	$1,989,172	$3,812,645
Net gain on joint ventures	—	466,103
Net gain on security transactions transferred to earned surplus (deficit)	$1,989,172	$4,278,748

See accompanying notes to financial statements.

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FILED
JUL 1 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

ALLEGHANY CORPORATION; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.; and ADELAIDE NEUWIRTH, on behalf of herself and all other common stockholders similarly situated,

Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM ON BEHALF OF APPELLANT ALLEGHANY CORPORATION SUBMITTED IN OPPOSITION TO APPELLEES' MOTION TO RE-TAX COSTS

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Alleghany Corporation

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 36

ALLEGHANY CORPORATION; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.; and ADELAIDE NEUWIRTH, on behalf of herself and all other common stockholders similarly situated,

Appellants,

v.

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM ON BEHALF OF APPELLANT ALLEGHANY CORPORATION SUBMITTED IN OPPOSITION TO APPELLEES' MOTION TO RE-TAX COSTS

On June 4, 1957, the Clerk of this Court transmitted to the United States District Court for the Southern District of New York, a certified copy of the judgment of this Court reversing the judgment below and directing that

costs in Nos. 36 and 82 be taxed against the appellees in those appeals. In accordance with Rule 57(2) of this Court, the judgment directed payment of the following costs:

No. 36	
Clerk's costs	$ 726.41
Printing record	3,673.59
Total	$4,400.00
No. 82	
Clerk's costs	$ 150.00

Under date of June 12, 1957, appellees Broswick & Co., Myron Neisloss and Randolph Phillips moved for an order re-taxing costs, asking that the movants be relieved of any obligation to pay any costs whatsoever. The grounds for the motion were said to be two: that the taxation of costs was "premature" and that it was "inequitable and inappropriate".

This memorandum is submitted on behalf of appellant Allegheny Corporation in opposition to the motion to re-tax in No. 36.

ARGUMENT

POINT I

It is contrary to modern federal practice to allow "costs to abide the event", as urged by appellees.

The principal ground of the motion to re-tax costs is that costs at this stage are "premature" in view of the Court's direction that further proceedings be had in the Court below. Appellees argue that costs should not be taxed until final disposition of the case after remand.

This amounts to a request to allow "costs to abide the event".

For over a hundred years the rule of the Federal courts appears to have been to refuse to allow costs to abide the event in the case of a reversal on appeal. In 1949 an opinion of the Court of Appeals for the Second Circuit, dealing with an application similar to the present one, noted an "unbroken practice" never to allow costs to abide the event where there has been a reversal. *Broffe* v. *Horton*, 173 F. 2d 565 (2nd Cir., 1949). The only exception the Court found was an 1847 case where the basis for ordering a new trial was an "error of the court", a special situation which the Second Circuit concluded in the later case had no rational basis as an exception to the rule.

Insofar as taxing costs is concerned, a judgment of reversal directing further proceedings in the District Court, is no different in principle from a direction for a new trial. Under established practice in the Federal courts, costs are regularly allowed to the prevailing party in the event of a reversal where a new trial is directed. See *Land Oberoesterreich* v. *Gude, et al.*, 93 F. 2d 292 (2nd Cir., 1937). In that case the Court of Appeals expressly noted that the items for clerk's costs and for printing the record "* * * are clearly costs incurred in respect to the appeal, which, under settled federal procedure, do not abide the event of the trial but are taxable in favor of the party prevailing on the appeal and are payable on reversal of the judgment." *Id.* at 293.

Although this Court apparently has no opinion dealing with the specific question raised by this motion, it has touched on a related problem: the case of a reversal in part and affirmance in part. In *St. Louis and San Francisco Railroad Company* v. *Spiller*, 275 U. S. 156 (1927), the Court held that the rule allowing costs to the appellant in the event of a reversal applied equally where the judgment below is reversed only in part while otherwise affirmed. That opinion, incidentally, traces in some detail (pp. 159-160) the history of the rule allowing costs to an appellant upon a reversal—a history inconsistent with the relief sought by this motion.

POINT II

Having stipulated to the parts of the record to be printed, appellees cannot now attack the computation of costs on the ground that unnecessary items were included in the printed record.

Rules 36(9) and 57(3) of the Rules of this Court clearly specify that the cost of printing the record on appeal is to be charged to the party against whom costs are taxed. Rule 36(7), however, qualifies this provision with the exception that if a party has caused unnecessary parts to be printed in the record, an appropriate order may be made by the Court as to costs.

Although appellees make no specific reference to these provisions, they argue in their motion that a substantial portion of the printing costs on this appeal (taxed at $3,673.59 rather than $4,590 as stated in the moving papers) resulted from the printing of documents bearing on an issue which this Court did not reach. Appellees clearly imply thereby that the actual amount of the printing expense included in the taxable costs is excessive. Appellees are vague as to the specific documents they now claim to have been printed unnecessarily, but as far as can be determined, the documents they do specify constitute only 129 pages of a 682 page printed record.

Appellees are in no position to argue that the printing of these or any other items was unnecessary. On September 20, 1956, appellees all joined in a written stipulation between all parties to these appeals, agreeing as to the specific items to be included in the printed record on appeal. All of the items now complained of were embraced by that stipulation. If they proved to be unnecessary, these appellees were as responsible for their printing as any one else.

POINT III

Not having obtained leave to proceed *in forma pauperis*, appellees must rely on the same remedies against a judgment for costs as any other judgment debtor.

Appellees also seek to avoid payment of costs on this appeal on the ground that they are small stockholders with impliedly limited resources, although they concede in their motion papers (p. 4) that their investment in Alleghany Corporation alone is worth $16,000.

Section 1915, Title 28, United States Code, (see this Court's Rule 53), expressly provides that any citizen-litigant who files an affidavit stating that he is unable to pay costs in advance, or to give security therefor, may be relieved of the obligation on application to the court. Section 1915 also contains a similar provision for the advance payment of the expense of printing the record on appeal, through the Administrative Office of the United States Courts. Apparently a similar application may also be made in advance by an appellee, in order to avoid a judgment for costs if he fails. STERN AND GRESSMAN, SUPREME COURT PRACTICE 174 (2d ed., 1954).

Appellees here have at no time made application to proceed *in forma pauperis*, and in their present motion they make no attempt to qualify for such treatment under either the statute or rule. An impecunious litigant who has not proceeded *in forma pauperis* and whose claim or defense proves to be without merit must instead look to the statutory provisions for the protection of judgment debtors. These provide him relief if he is unable to satisfy the judgment for costs. That is appellees' remedy here.

The appellees' claim that the present case involves matters of public interest does not affect taxation of costs. By seeking to assume the role of defender of the public interest, appellees also assumed all of the risks of failure. Our system of judicial administration requires that one who wishes to call on the courts for assistance without being taxed for costs must be successful.

The present after-the-fact motion to be relieved of costs works an unfairness on the other parties to the appeal. When appellees entered into a stipulation as to the contents of the printed record under Rule 17(3), they necessarily led the other parties to believe that they would be bound by the provisions of Rules 36(9) and 57(3), and impliedly agreed that the cost of printing the record would be paid by the party against whom the costs were taxed at the termination of the appeal. This motion violates that implied agreement.

Conclusion

Appellees' motion to re-tax costs involves an attempt to revive a long rejected practice to allow "costs to abide the event". The suggestion by appellees that the expense of printing the record should be reduced is clearly improper in the face of their stipulation as to what the printed record should contain. Finally, the request to reduce the amount of costs to be paid by appellees as "small stockholders" is inappropriate. Appellees saw fit to bring and maintain suit against appellant Alleghany Corporation, which has proved to be costly to such appellant and its other stockholders.

The motion to re-tax costs should be denied in all respects.

Respectfully submitted,

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